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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 42,480

MISSISSIPPI POWER & LIGHT COMPANY, MISSISSIPPI MUNICIPAL ASSOCIATION AND CITY OF CLINTON,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

No. 42,535

MISSISSIPPI POWER & LIGHT COMPANY AND MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

JURISDICTIONAL STATEMENT

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Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

JURISDICTIONAL STATEMENT

The parties appellant in Cause No. 42,480 are Mississippi Power & Light Company (Appellant), Mississippi Municipal Association (Intervenor) and City of Clinton

(Intervenor). The parties appellant in Cause No. 42,535 are Mississippi Power & Light Company (Appellant) and Mississippi Municipal Association (Intervenor). In both causes, said Appellant and said Intervenors are collectively sometimes referred to as "Appellants".

Pursuant to Rule 15(3), 28 *U.S.C.*, the Appellants file a single statement because these two appeals are from the Supreme Court of the State of Mississippi in companion cases involving precisely similar constitutional questions, as was said in *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 149 So.2d 504, 513:

> "Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U. S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. * * *."

And in *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 150 So.2d 534, 541:

> "It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, cl. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case."

Appellants appeal from final judgments of the Supreme Court of Mississippi in favor of Delta Electric Power Asso-

ciation (Delta) on April 8, 1963, and Capital Electric Power Association (Capital) on April 15, 1963, denying Appellants' claim of contract impairment and denial of due process and equal protection. By this Statement, filed pursuant to Rule 13 and in conformity with Rule 15 of the Revised Rules of this Court, it will be shown that this Court has jurisdiction, and that the questions presented are substantial.

OPINIONS BELOW

The cases are not yet officially reported but appear thus: *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ____ Miss. ____, 149 So.2d 504, Suggestion of Error overruled without opinion; and *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ____ Miss. ____, 150 So.2d 534, Suggestion of Error overruled without opinion. The opinions are annexed hereto as Appendix 1-A and Appendix 1-B, respectively. The opinions of the Chancellors, reversed by the Supreme Court of Mississippi, are annexed hereto as Appendix 1-C and Appendix 1-D, respectively.

JURISDICTION

Delta and Capital, together called "Association" or "Associations", each severally instituted before the Mississippi Public Service Commission (Commission) an action to compel Appellant to cease to serve areas certificated to each Association and to remove therefrom Appellant's facilities installed pursuant to claimed constitutional rights. Appropriate relief being granted Associations, Appellants appealed to the Chancery Court of Hinds County, wherein the Commission was reversed. Thereupon, Associations ap-

pealed to the Mississippi Supreme Court, wherein the Chancery Court was reversed and the order of the Commission reinstated. Therefrom Appellants appeal to this Court.

The judgment in No. 42,535 (Delta) was entered on February 11, 1963, and became final on April 8, 1963, when Suggestion of Error was overruled. The Notice of Appeal was filed in the Supreme Court of Mississippi on May 24, 1963. On May 24, 1963, the Supreme Court of Mississippi enlarged the time for docketing the record on appeal to September 1, 1963.

The judgment in No. 42,480 (Capital) was entered on March 11, 1963, and became final on April 15, 1963, when Suggestion of Error was overruled. The Notice of Appeal was filed in the Supreme Court of Mississippi on May 24, 1963. On May 24, 1963, the Supreme Court of Mississippi enlarged the time for docketing the record on appeal to September 1, 1963.

Section 1257(2), Title 28, *U.S.C.*, confers on this Court jurisdiction of this appeal. Note Section 2103, Title 28, *U.S.C.*

Appellant claimed that its franchise and street lighting contracts were impaired by Section 7716-01, *et seq.*, *Recompiled Mississippi Code of 1942*. Mississippi's Court sustained the statute as valid and denied the relief demanded. Mississippi's Court is the highest court that may consider these questions. Review here, therefore, is allowed as of right. *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555, 4 L. ed. 2d 1397.

The following cases sustain the jurisdiction of this Court on direct appeal from the Supreme Court of Mississippi when that Court sustained as valid Section 7716-05(b), *Recompiled Mississippi Code of 1942*, and denied

constitutional rights: *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155; *Woodruff* v. *State*, 162 U.S. 291, 40 L. ed. 973; *Planters Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447; *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204; *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268; *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341.

The State statutes involved are:

1. Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*), Appendix 2 hereto, limited by Section 3406, *Mississippi Code of 1942* (now Section 3374-120, *Recompiled Mississippi Code of 1942*), empowering municipalities:

> "To grant any person or corporation the use of the streets, alleys, and public grounds for the purpose of laying gas, water, sewer, or steam pipes, or conduits for electric light, telegraph and telephone lines, to be used in furnishing or supplying the municipality and inhabitants, or any person or corporation, with gas, water, sewerage, steam, or hot air for heating purposes, or light; but a franchise, right of way, or privilege of any character whatever, shall not be granted for a longer period than twenty-five years, and such privilege shall not be exclusive."

2. Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*), Appendix 3 hereto.

3. Sections 7716-01, *et seq.*, *Recompiled Mississippi Code of 1942*, especially Sections 7716-05(b) and 7716-38, Appendix 4 hereto, herein called the "Act". This "Act" was first passed and became effective on March 29, 1956.

4. Section 88, *Mississippi Constitution*, Appendix 5 hereto.

5 Section 2780, Recompiled Mississippi Code of 1942, Appendix 5-A hereto.

QUESTIONS PRESENTED

I. Where a contractual franchise is duly granted by a municipality for twenty-five years to serve within its boundaries as they now are "or may hereafter be laid out or extended" and the franchised utility performs the franchise and makes investments in facilities to render service in the disputed area, may the State of Mississippi by the Public Service Commission Act impair the franchise contract by deleting "as they * * * may hereafter be laid out or extended", when the municipality had express power to extend or contract its boundaries under the law of the State? Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*). (The disputed area referred to is the territory annexed to the municipalities after the franchises were granted, as hereinafter set forth.)

II. Where a contract is duly entered into by a municipality with an electric utility to furnish all street lighting service required by the municipality, may the State of Mississippi by the Public Service Commission Act impair the contract by holding it ineffectual in the disputed area during the contract period, despite the Contract Clause and the Fourteenth Amendment? Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*).

III. Notwithstanding the Contract Clause and the Due Process Clause of the Federal Constitution, could the Act, by Section 7716-05(b), *Recompiled Mississippi Code of 1942*, and the certificate made pursuant thereto by the

Public Service Commission, confer upon Associations an exclusive electric franchise in the disputed area and take from Appellant that participation expressly vouchsafed by the non-exclusive provision therein before the expiration of its franchise wher , by Section 7716-38, *Recompiled Mississippi Code of 1942*, it was expressly provided:

> "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

IV. Was there not a denial of procedural due process under the Federal Constitution, Fourteenth Amendment?

V. By reason of Title 7, *U.S.C.*, Ch. 31, Section 901, *et seq.*, Ch. 432, Title I, Section 4, 49 Stat. 1365, as amended, and said loan to Associations, has Appellant justiciable rights against Association?

STATEMENT OF THE CASE

That presented is the classic case of impairment of the obligation of contract by state statute. The decisions of the Supreme Court of Mississippi upon these two test cases reach into every municipality in Mississippi—and elsewhere, if this precedent be followed—to strike down all municipal regulation of utility operation and to destroy the thousands of dollars invested on the faith of municipal franchises and contracts. The importance of these cases in Mississippi is evidenced by the intervention of the Mississippi Municipal Association, representing all

major municipalities in the State, and of the City of Clinton, Mississippi.

One of the great trends in our country's present development is municipal expansion. Growth in size and city planning are essential if the benefits of municipal government are to reach suburbia. The municipalities involved, for valuable consideration, granted twenty-five year franchises to the utility—the franchise had to be for a long enough time to justify the utility's initial investment for installing its plant and lines. *People ex rel. Woodhaven Gaslight Co.* v. *Deehan,* 153 N.Y. 528, 533, quoted with approval in *Russell* v. *Sebastian,* 233 U.S. 195, 209, 58 L. ed. 912, 923. Municipal planners foresaw growth and, therefore, obligated the utility to furnish service not only within the then boundaries of the municipalities but also as the same might be extended. The utility in performing its contract is shown by the record to have planned and developed its system so as to provide for growth into suburbia.

Appellant operates an electric utility system throughout the western half of the State of Mississippi and has been doing business in Winona and Clinton as such utility since before 1930, under municipal franchises.

The State of Mississippi, possessing plenary power statewide, delegated legislative power to Winona to "contract and be contracted with and exercise and perform all municipal powers and duties", Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*). On February 23, 1948, the State, acting through the Mayor and Board of Aldermen of Winona granted to Appellant a twenty-five year non-exclusive electric utility franchise within its boundaries "as they now exist or may hereafter be laid out or extended", said

franchise being Appendix "6" hereto. By Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*), the State fixed the limits wherein the franchise would be operative and Appellant was compelled, when it accepted this franchise, to leave vested in the State the right to expand or contract the municipal boundaries. When such expansion occurred, Appellant had contractually agreed to be bound thereby and correlatively was entitled to the non-exclusive rights in the disputed area.

A lawful addition was made to Winona on November 3, 1959. Upon March 29, 1956, the Public Service Commission Act, Ch. 5, Sections 7716-01, *et seq.*, and especially Section 7716-05(b), *Recompiled Mississippi Code of 1942*, became law and effective, pursuant whereto the Commission issued the certificate of convenience and necessity whereunder Delta was awarded by the State Supreme Court an exclusive state-granted franchise to the area annexed to Winona (herein called "disputed area" or "Area B"). But this construction of this statute, as to the constitutional rights of Appellants, is, with deference, most seriously challenged under Section 7716-38 thereof.

Appellant constructed certain electric facilities in the disputed area after November 3, 1959. Thereupon Association instituted before the Public Service Commission a cease and desist proceeding seeking to oust Appellant from the disputed area. The Mississippi Municipal Association became a party thereto and strenuously contended for the right of municipalities so to contract. Appellant interposed its franchise in its pleadings and evidence, and the Commission said:

"* * * We do not consider the municipal franchise granted Mississippi Power & Light Company by the

City of Winona to be germane to any of the issues in this cause. Therefore we have disregarded the franchise completely as we believe it has no bearing on the case. The Commission, however, does not decide or pass upon the validity of the franchise or attempt to interpret or construe its provisions. The Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Dockets No. U-44 and U-117. The first certificate does not include the disputed area. The second certificate does include the area in question."

And ordered:

"Mississippi Power & Light Company be and it is hereby commanded, required and ordered to cease and desist from offering any electric service or street lighting service in the newly annexed area to the City of Winona. * * *.

"Mississippi Power & Light Company be and it is hereby commanded, required and ordered to remove all of its electric lines and facilities which it has constructed and is now operating or maintaining within the disputed area * * *."

The Supreme Court thereasto said, 149 So.2d 513:

"Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. * * *."

The State reserved no unilateral power to exclude Appellant from the disputed area, which is essential under decisions of this Court. *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; *Dartmouth College*

v. *Woodward*, 4 Wheat. 518. 4 L. ed. 629, Story J. *Opinion; Planters' Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447. See *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666.

Upon February 23, 1948, the State, through the Mayor and Board of Aldermen of the City of Winona, as then was, contracted with Appellant that "Company will furnish and Municipality will take and pay for its entire lighting service during the term of this Agreement * * *", said contract being Appendix "7" hereto. Said contract, a typical total requirements contract, has never been cancelled and has been fully performed by Appellant. Compare *Mississippi Power & Light Co.* v. *Town of Coldwater*, D.C. Miss., 168 F. Supp. 463. But the State assumed to lift the disputed area out of its terms, thus confining the Appellant's right to serve to the original "now" limits.

The State of Mississippi, acting through its public agencies, the municipalities, had authorized electric franchises therein for a period of twenty-five years and had prohibited the granting of any exclusive franchises. Section 3374-120, *Recompiled Mississippi Code of 1942*.

The Public Service Commission declined to integrate into this cause the consideration of (a) the franchise and (b) the service contract and assumed to pass upon the Appellant's rights exclusively under the certificate of convenience and necessity; and substantially the Supreme Court affirmed this action with the State of Mississippi and Winona not before the Commission.

Under Chapter 432, Title I, Section 4, 49 Stat. 1365, as amended (Title 7, *U.S.C.*, Ch. 31, Section 901, *et seq.*), the Association borrowed from the United States at 2%, in part to construct its plant. But the United States, in

passing said Act, intended to protect Appellant. Under said Act, in accordance with the assurances given in Congress when the same was passed, the Association could not (a) operate in a municipality having more than 1500 inhabitants—Winona has nearly 4,000—nor (b) supply electricity where the consumers were receiving central station power, nor again, (c) directly furnish electricity to Winona. Appellant asserted its rights to be thereasagainst protected, having a franchise and a total requirements contract with said Winona, as hereinabove stated.

At Clinton, the municipal powers were the same as at Winona. The terms of the franchise and the street lighting contract were identical, save as to the dates (and therefore not appended). Annexations occurred at different times. The City of Clinton was a party to the proceeding before the Public Service Commission, in order to uphold its franchise and contract with Appellant, but the State, qua State, was not.

Under Section 7716-05(b), *Recompiled Mississippi Code of 1942*, as construed by Mississippi's Court herein, Appellant had its non-exclusive franchise as to the disputed area taken away pursuant to that Section, despite reliance upon the Constitution. The Supreme Court likewise took away the disputed area from Appellant's exclusive requirements contract solely in virtue of this Section.

Sections 7716-05(b) and 7716-38, *Recompiled Mississippi Code of 1942*, were erroneously construed by Mississippi's Supreme Court; and as construed, the statutes are rendered unconstitutional. Appropriate construction under the Federal Constitution is here requisite; and when so appropriately construed by this Court, neither the franchise nor the lighting contract will have been impaired,

but will persist until their contractual expiration, 1973 and 1971, respectively.

Appropriate appellate review is sought here.

THE QUESTIONS ARE SUBSTANTIAL

I.

These questions have been inserted, *supra*, and are not repeated here. To save prolixity, reference is respectfully made.

A.

The Contract Clause

1. The Contract Clause, *United States Constitution*, Article I, Section X, Cl. 1, provides:

> "1. No State shall * * * pass any * * * Law Impairing the Obligation of Contracts, * * *."

2. That segment of the contract whereasto impairment is claimed reads, in part (the full text being Appendix "6"):

> "SECTION 2. The Grantee is hereby further given and vested with *full right*, authority, easements, privilege and franchise to construct, re-construct, erect, suspend, install, renew, maintain, operate and conduct *in said municipality* a system of poles, towers, conduits, cables, conductors, transformers, fittings, and all appliances and appurtenances *now, or hereafter, during the life of this franchise*, necessary or desirable to the transmission, distribution and/or sale of electric current, for all purposes whatsoever, in, over, under, along, upon and across all streets, alleys, ways, bridges and public places and other municipal property *in said municipality, as they now exist, or may hereafter be laid out or extended*, together with

the further full right, privilege, easement, authority and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain and operate said poles, towers, conduits, cables, conductors, transformers, fittings and all other appliances and appurtenances *now or hereafter, during the life of this franchise, necessary or desirable for the transmission within, through and over and beyond said municipality, and to electricity consumers, both within and beyond the limits thereof,* electricity for lighting, heating, power and all other purposes for which electricity *may be now, or hereafter used, and for the purpose of extending its system beyond the limits of the municipality as they now may, or may hereafter exist.*" (Emphasis ours, unless otherwise noted).

3. The contract was dated February 23, 1948, and was then accepted and performance begun, approximately eight years prior to the enactment by the State of Mississippi of the statute which is now held to deprive Appellant of its rights thereunder. With deference, Mississippi's Court's conclusion is overwhelmed by *Russell* v. *Sebastian*, 233 U.S. 195, 58 L. ed. 912, where this Court said, after acceptance, the franchise was effective as an entirety "not foot by foot, as pipes were laid". The addition to Winona whereasto this controversy centers was lawfully made upon November 3, 1959. Assume concentric circles represent the former and present municipal boundaries. The inner circle, "A", will represent the municipal limits on February 23, 1948, whereasto there is no dispute; and "B" will represent the area between the circumference of the inner circle and the outer circle, the addition to the municipal limits made November 3, 1959. The disputed area, "B", was awarded by Mississippi's Court to Appellee under its certificate and Appellant confined to "A". To make the case clearer, assume that "A", whereto the Court has confined Appellant, is the old town wherein may be slums and absolutely no industrial load; in the extended

area "B", modern suburbia exists with large industrial loads.

Appellant has never contended that on November 2, 1959, Winona had full jurisdiction over the streets then not within the city; but it has contended that on February 23, 1948, it had legislative authority to grant a franchise to terminate on February 22, 1973. The State had given it a power to contract that when, if and after this addition to the boundaries was made upon November 3, 1959, the franchise *eo instanti* would become co-extensive with the addition, Area "B", under Section 3374-10, *Recompiled Mississippi Code of 1942. In the Matter of the Enlargement of the Municipal Boundaries of the City of Forest, Mississippi,* ..... Miss. ....., 153 So.2d 688. It would have been a deception to have granted power to make the franchise effectual until 1973 if the State had reserved to itself secretly the right to prohibit, after March 29, 1956, any addition lawfully made from becoming subject to the franchise.

The universal rule - - - until this decision - - - is that, in the absence of special provisions to the contrary - - - and there are none such here - - - all municipal ordinances and contracts of a general character automatically and simultaneously extend over and become operative in territory immediately upon its annexation to a city. Compare *City of Ellisville* v. *State Highway Commission,* 186 Miss. 473, 191 So. 274; 37 *Am. Jur.,* "Municipal Corporations", Sec. 34, p. 651; 62 *C.J.S.,* "Municipal Corporations", Sec. 78, p. 186; *McQuillin on Municipal Corporations,* 3rd Ed., Vol. 5, Sec. 1530; *Pond on Public Utilities,* 4th Ed., Sec. 131, p. 316, *et seq.* In *Seattle Lighting Co.* v. *City of Seattle,* 54 Wash. 9, 102 P. 767, it was said:

> "* * * It will be readily seen that the franchises above referred to were not confined to any particular

> streets or district within the city. The language is broad and clear. The grant is a general grant 'throughout the city of Seattle and throughout any addition thereto,' and 'as the boundaries thereof are or may hereafter be.' It is clear from the language here used that the city intended to grant the right throughout the whole city as it then was and as it might thereafter be extended. * * * . We think a reasonable construction of the language of the grant requires us to hold that the city intended the grant to be a general continuing one, expanding with the city, and not one limited to a particular district."

In 13 *Am. & Eng. Anno. Cases* 137, it is said:

> "A municipality has power to contract by ordinance that a franchise granted shall be in force in the corporate limits of the city as they exist at the time of the passage of the ordinance or as they may thereafter be enlarged, for, if the ordinances were silent as to the territory thereafter taken into the city, the meaning would be the same. Truesdale v. Newport, (Ky.) 90 S.W. 589."

It is passing strange that substantially the sole authority seized upon by the Supreme Court of Mississippi as a basis for its decision and as a means for eluding the constitutional questions was the above *Annotation*. That Court cited the above *Annotation* as holding directly contrary to that just quoted.

Compare *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808, wherein the same authority as was given to Winona was construed when Vicksburg had, through its Mayor and Board of Aldermen, enacted a franchise, containing, 185 U.S. 69:

> " 'Sec. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes ef-

> fect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, *and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction,* * * *.'"

The Supreme Court of Mississippi in *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167, and *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011, and this Court in *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102, and *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, without question held that where such a grant had been made by the Legislature and such an exercise of a power had by the municipality, the franchise as to "now or hereafter" was effective. We assert this as the universal rule. Compare *Pacific Tel. & Tel. Co.* v. *City of Los Angeles*, 44 Cal. 2d 272, 282 P.2d 36; *Traverse City* v. *Consumers Power Co.*, 340 Mich. 85, 64 N.W.2d 894; and in *Tulsa St. Ry. Co.* v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 113 P. 180, that Court said:

> "* * * Discussing this question in Seattle Lighting Co. v. City of Seattle et al., 54 Wash. 9, 102 Pac. 767, the Court said: '*Appellants also contend that the city had no power to grant a franchise without its corporate limits. It did not do so in this case.* The grant is confined to the city, and is effective within and not without the city limits. As soon as new territory is taken into the city, the grant immediately attaches without any further action on the part of the city.' Other cases in point, or the reasoning of which supports this doctrine, are: Truesdale v. City of Newport, 90 S.W. 589, 28 Ky. Law Rep. 840; * * *."

(a) The contract was validly granted by the State of Mississippi under plenary authority therefor precedently vouchsafed to the State's agency. Compare *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771; *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167; *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011; and especially *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; and *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155. Sp. *Arizona* v. *California*, ____ U.S. ____, 10 L. ed. 2d 542; *Cleveland* v. *Cleveland City R. Co.*, 194 U.S. 517, 48 L. ed. 1102; but *arguendo*, that the grant in part was without power;

(b) The Act, instead of taking away Appellants' rights, confirms them, in this, that Section 7716-05(b) alleged to have been emasculated is but a general provision and there is therein the last provision, Section 7716-38, whose express provision is:

> "* * * but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

United States v. *Heinszen*, 206 U.S. 370, 51 L. ed. 1098; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 76 L. ed. 704; *Vaughan* v. *Swazie*, 56 Miss. 704. While these two sections should be construed to harmonize, under our Court's interpretation, with deference, this may not be so. Accordingly until 1973, this last Section makes our rights dominant and those of the Appellee servient. *Coker* v. *Wilkinson*, 142 Miss. 1, 106 So. 886; *Inglehart* v. *Inglehart*, 204 U.S. 478, 51 L. ed. 575; but if therein we err, then *arguendo*

(c) An appropriate construction of Section 7716-05 (b) is to be had whereby serious constitutional questions may be avoided. This Court said in *Rosenberg* v. *Fleuti*, U.S. , 10 L. ed. 2d 1000, 1002:

> "* * * Upon consideration of the case, however, and in accordance with the long-established principle that 'we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable,' Spector Motor Service, Inc., v. McLaughlin, 323 U.S. 101, 105, 89 L. ed. 101, 103, 65 S. Ct. 152; see also Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 91 L. ed. 128, 67 S. Ct. 231; Neese v. Southern R. Co., 350 U.S. 77, 100 L. ed. 60, 76 S. Ct. 131; Mackey v. Mendoza-Martinez, 362 U.S. 384, 4 L. ed. 2d 812, 80 S. Ct. 785, we have concluded that there is a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether §212(a)(4) is constitutional as applied to respondent."

See also *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 4 L. ed. 2d 1170, 1177; *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; and Section 7716-05(b), on its face, related exclusively to the future with Appellant's franchise dominant.

We stress that Appellant has never alleged that its franchise contract cancelled Appellee's certificate rights, but only that Appellant's rights were first in time and, therefore, in law; and that this Court, properly construing the grant of power made by the state, must do that which was done by this Court in *Woodruff* v. *State of Mississippi*, 162 U.S. 291, 40 L. ed. 973, where, when Mississippi's Court held the delegation of power to be void, this Court appropriately held valid and imposed the obligation accordingly.

Normally, Appellants' Jurisdictional Statement as to Question I should here terminate, but having briefed to the

point of demonstration, we submit, for utilization if the Court sees proper, an epitome of that relied on below as Appendix "8".

With deference, we submit that the contract above quoted is valid and has been made a shambles of by Mississippi's Court, contrary to the Contract Clause. Mississippi's Court assumed to assign certain reasons for its holding whereasto this Court has exclusive jurisdiction and whereover herein it must exercise that jurisdiction to prevent the wrack and ruin that otherwise would be wrought:

(1) The police power. Under the State's police power the right to impair is wrongfully claimed. Compare *Stone* v. *State of Mississippi*, 101 U.S. 814, 821, 25 L. ed. 1079, wherein Mr. Chief Justice Waite made crystal clear that as to property rights impairment might not be, and these are property rights of Appellant. *Alabama Power Company* v. *Ickes*, 302 U.S. 464, 82 L. ed. 374. As to our franchise, note *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, and the *Vicksburg Cases*, cited *supra*. In *Fletcher* v. *Peck*, 6 Cranch 87, 3 L. ed. 162, Mr. Chief Justice Marshall said, p. 178:

> "* * * A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant."

Compare *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204; *Detroit United Ry.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

In *Fauntleroy* v. *Lum*, 210 U.S. 230, 52 L. ed. 1039, from this State, both the Legislature and the Court asserted the supremacy of the police power against a judgment lawfully rendered in Missouri upon a Mississippi transaction, but this Court held the Full Faith and Credit Clause paramount thereto.

(2) Alleged plenary power of the State over its municipalities. Unquestionably, *inter se*, between the State, *qua* State, and the municipality, there is a power whereover the Contract Clause is not operative, for the reason of the unity of the State and its agency. "L'etat, c'est moi". *New Orleans* v. *New Orleans Waterworks*, 142 U.S. 79, 35 L. ed. 943; *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511, 13 L. ed. 518; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110. But when the State authorizes a municipality to contract with a third party and that contract with that third party has been made, then the State has plenary power *with the consent of the contractee* to modify or cancel, disregarding the city. Compare *Worcester* v. *Worcester Consolidated Street R. Co.*, 196 U.S. 539, 49 L. ed. 591; *Trenton* v. *New Jersey*, 262 U.S. 182, 67 L. ed. 937. Of course, the required consent was lacking in these cases.

The interlock between the State and its municipalities, the State possessing plenary power thereasto, is *sui generis;* and when the State could authorize the municipality to act and the municipality has, assuming that power to exist, contracted as was here done, our submission is that the State is estopped from alleging that its representative did not have power to do that done when this course had persisted for three-quarters of a century. The State's action after such a lapse of time brings in the well known maxim, "Nemo allegans suam turpitudinem est audiendus", 66 *C.J.S.* 4; or if that be not granted, then "Verba chartarum fortius accipiuntur contra proferentem", *Broom's Legal Maxims*, p. 594. The Legislature with the whole dictionary at its command chose that verbiage whose connotation has been fixed and, after all these years, this verbiage may not be so wrested from its judicially defined definition as to wreck those who in good faith relied thereon. When Appellant accepted the franchise, the Con-

tract Clause supervened and no impairment could happen. *Gomillion* v. *Lightfoot*, 362 U.S. 339, 5 L. ed. 2d 110; *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389.

(3) The Court relied on Section 2780, *Recompiled Mississippi Code of 1942* (Appendix No. 5-A), as a predicate for excluding Appellant from Area "B". Thereasto the Court declared, *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ....., 149 So.2d 504, 513:

> "* * * Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation."

This grant was to all persons and was non-exclusive until March 29, 1956. Prior to that date, it had been utilized by the electric companies, possibly in contravention of Section 95, *Mississippi Constitution*, prohibiting donations. Compare *Willmut Gas & Oil Company* v. *Covington County*, 221 Miss. 613, 71 So.2d 184, appeal dismissed, 348 U.S. 891, 99 L. ed. 700; but in virtue of the certificate issued under Section 7716-05(b), the Mississippi Court assumed to vouchsafe to Appellee an exclusive perpetual franchise under a certificate of convenience and necessity, therethrough excluding Appellant from Area "B", notwithstanding its non-exclusive rights therein. The certificate received from the Commission by Appellee necessarily by law contained the limitation, "This certificate of convenience and necessity is dependent upon the securing by grantee of a valid non-exclusive municipal franchise to serve in Area 'B'." See *Payne* v. *Jackson City Lines*, 220 Miss. 180, 70 So.2d 520; *Oliphant* v. *The Carthage Bank*, 224 Miss. 386, 80 So.2d 63.

The rights of both Appellant and Appellee could coexist; and Section 2780 did not pretend to make any right

thus exercised exclusive. In *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 83 L. ed. 543, this Court thoroughly explored the rights of the holders of certificates of public convenience and necessity and held that such holders had no standing to question subsequent competition by the T.V.A. See especially 306 U.S. 140-143, 83 L. ed. 551-552.

The Act itself authorizes at any time an application to the Commission for a certificate. If under certain conditions, within six months, an application has been filed, then it issues without proof, but this free grant does not divest the Commission of plenary jurisdiction if essential to grant at any time a certificate of convenience and necessity; and just as the Interstate Commerce Commission can issue conditional certificates to protect existent or essential rights, the Commission here may do likewise. Furthermore, for any failure hereasto, Appellee may not challenge. *Alabama Power Company* v. *Ickes*, 302 U.S. 464, 82 L. ed. 374, approving *New Orleans, M. & T.R. Co.* v. *Ellerman*, 105 U.S. 166, 26 L. ed. 1015; see also *West Bros.* v. *Illinois C.R. Co.*, 222 Miss. 235, 75 So.2d 723. Neither the State nor Winona have attacked the now or "hereafter" clause and until they do, Appellee, who is not in privity, may not affect a contract to which it is not a party. Compare *Wade* v. *Colonization Society*, 7 Sm. & M. 663; *Jones* v. *Habersham*, 107 U.S. 174, 27 L. ed. 401; *Middleton* v. *Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

(4) As to the Contract Clause, Mississippi Court's jurisdiction is subordinate and cannot in any wise contravene that specifically provided by the parties and prescribed by law; and when that Court undertook to say that no impairment had occurred, as to the obligation of the contract, by declaring that thereasto the State had

plenary authority, that Court plainly usurped the jurisdiction of this Court and wrecked Appellants. All of these cases, as above shown, had been decided previously by the Supreme Court of Mississippi and by this Court in cases coming from this State; and the law thereasto is that this contract is valid and has been fundamentally impaired. In fact, the impact of the Act upon the structure precedently existing has been to render requisite this review. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; *Planters' Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447; *Detroit United R. Co.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268; and *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204.

Upon full argument, the validity of this contract with its flagrant impairment can be demonstrated under multiple decisions not herein called to this Court's attention in this Jurisdictional Statement. Our contracts having been ignored, it was precisely the same situation this Court rectified in *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. ed. 215, where, though summoned, the party was not permitted to defend.

B.

Violation of Fourteenth Amendment, Both Due Process and Equal Protection

That apposite hereinabove set out, with deference, is referred to.

The Commission broadly stated that, without consideration of the franchises, Appellees' certificates primed. The Commission did not deign to discuss, if it constitutionally could, the relative merits, but awarded, without weighing, Appellees certificates excluding Appellant from Area "B", while compelling Appellant to perform in Area

"A". So to sever and divide contracts is constitutionally unthinkable. The authorities hereasto appear later.

Grievous wrong has been wrought, contrary to the Constitution by a statute subsequently passed. If appropriately construed under the Constitution, all rights can be secured and preserved; but if the construction made by Mississippi's Court thereasto, which, with deference, we submit was wrongful, is here approved, that constitutional protection whereto contracts are entitled will have disappeared from off the earth by the failure, with deference, of this Court to effectuate that to it solely entrusted.

II.

Admitting *arguendo* that Section 7716-05(b), *Recompiled Mississippi Code of 1942*, was appropriately construed by the Supreme Court of Mississippi, thereby excising from Appellant's contracts the municipal consumption within Area "B", thereby said Section impaired the obligation of the contract. The contracts explicitly provided:

> "1. Company will furnish and Municipality will take and pay for its entire street lighting service during the term of this Agreement in accordance with Rate Schedule SL-4 & SL-5 attached hereto and made a part hereof.
>
> * * *
>
> "6. The term of this Agreement shall be for five years from and after the date hereof and shall be automatically extended for a period of five years from each expiration date of such time, or any automatic extension thereof, unless and until either party shall notify the other in writing not less than 180 days nor more than 360 days prior to any expiration date of its intention to terminate this Agreement."

Basically, this contract is statewide; and in *Mississippi Power & Light Company* v. *Coldwater*, D.C. Miss., 168 F.

Supp. 463, a precisely similar contract has been sustained as valid.

Herein the municipality contracted to purchase its requirements from Appellant, provided neither Appellant nor the municipality gave cancellation notice at a terminal period. Requirements contracts are standard. *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U.S. 353, 73 L. ed. 1112; "Annotation", 5 L. ed. 2d 1105, 1110; 5 *Williston on Contracts* (Rev. Ed.), Sec. 1651A, p. 4646; 46 *Am. Jur.*, "Sales", Sec. 158, p. 334; 77 *C.J.S.*, "Sales", Sec. 171, p. 906.

This contract is valid under the cases cited herein.

Every statute of Mississippi as appropriately construed by this Court becomes a part of the obligation of this contract. *Keefe* v. *Clark*, 322 U.S. 392, 88 L. ed. 1347; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 18 L. ed. 403; *Wisconsin Lbr. Co.* v. *State*, 97 Miss. 571, 54 So. 247.

This is not a case wherein there has been the ordinary breach of contract by a corporation, but the State Legislature, speaking with the State's sovereign power, has assumed to take from that contract that which was Appellant's and transferred it to Appellees, according to the decision here sought to be reviewed, and condemned Appelant to destroy its facilities constructed in strict accordance with the contract and to desist from electric service, this contract to the contrary notwithstanding.

That there was impairment is demonstrated by *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 82, 46 L. ed. 808. There was a thirty year contract for hydrant rental, and this Court, *inter alia*, said, p. 82:

> "* * * we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the waterworks company that the mayor and aldermen deny any liability upon any contract

> for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question."

At the instance of Appellee, the State not being a party, Mississippi's Court, wrongfully assuming to act unmindful of the Contract Clause, has attempted to strike down the contract in part and to leave it in effect at its pleasure. As to impairment, this Court said in *Planters' Bank* v. *Sharp*, 6 How. 301, 327, 12 L. ed. 447:

> "One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its force. The Commercial Bank of Rodney v. The State of Mississippi, 4 Smedes & Marshall, 507. So, if the obligation of a contract is to be regarded as the duty imposed by it, here the duty imposed by the State to adhere to its own deliberate grant, and the duty imposed on the signer of the note to make payment to an assignee, as well as to the bank itself, are both interfered with and altered."

Note further that the State, *quo* State, has not come into this litigation, but an REA is the sole protagonist which has struck down this contract, over the protests of all parties concerned in the Clinton case, when, with deference, circumstanced as the State is, it was an indispensable party hereto. Compare *Hansberry* v. *Lee*, 311 U.S. 32, 85 L. ed. 22; *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 78 L. ed. 894.

Appellant's contracts are dominant. Anything Appellee may have is subsequent thereto and therefore must be servient. This Court alone has that jurisdiction which may rectify the wrong wrought.

With reference to the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the United States in *Owens* v. *Battenfield*, 33 F.2d 53, 280 U.S. 605, 74 L. ed. 649, 50 S. Ct. 88, has held that the Amendment is not limited as to the form in which, or the agency by which, the State may act in denying "due process". The Court further held that any such action by the State, either by an executive, legislative or judicial agency, comes within the meaning of the Amendment. See also *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 41 L. ed. 979, 17 S. Ct. 581; *Scott* v. *McNeal*, 154 U.S. 34, 14 S. Ct. 1108, 38 L. ed. 896. *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

III.

Basically the construction of the contract and the impairment rests as to the Constitution with this Court, but appropriate respect is vouchsafed the State Court's opinion. Compare *Woodruff* v. *State of Mississippi*, 162 U.S. 291, 40 L. ed. 973, 66 Miss. 298, wherein Mississippi's Legislature authorized the No. 1 Levee Board to "borrow money". Pursuant thereto, that Board obtained gold

tinted paper and recited the receipt of gold dollars which were then at a great premium. Mississippi's Court held that this contract to pay in gold was *ultra vires* and the bonds void. Upon appeal here, after being thrice argued as to whether or not this gold bond, so-called, was solvable in gold or in dollars, this Court found it so solvable and reversed Mississippi's Court. *Planters' Bank* v. *Sharp*, 6 How. 301, 12 L. ed. 447; *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268; *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204.

With this primary obligation of constitutional construction, it is fundamentally mandatory that if the case may be solved and a serious constitutional question avoided, it must so be. *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; *Lynch* v. *Overhalser*, 369 U.S. 705, 8 L. ed. 2d 211; and in *International Machinists* v. *Street*, 357 U.S. 740, 749, 6 L. ed. 2d 1141, 1150, this Court said:

> "* * * Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' Crowell v. Benson, 285 U.S. 22, 76 L. ed. 598, 619, 52 S. Ct. 285. * * *."

Hereinabove under Question I(c), Appellants have demanded as their constitutional right a correct construction of Section 7716-05(b) and likewise of Section 7716-38, and to avoid prolixity make reference to same.

Appellants submit it to be obligatory, in order to conform to the Constitution, that Appellant's contracts, quoted *supra*, be adjudged to be valid, especially the provision "now or hereafter". This Court cannot forget that in 1886,

under a grant of power the precise equivalent of that made by the State to the municipalities, the City of Vicksburg passed a thirty year franchise containing not only the "now or hereafter" clause, but a further provision as to jurisdiction conferred and, under Section 13 of the ordinance, allowing the fixation of reasonable rates; and that this Court validly assumed that the thirteenth clause as to the fixation of rates in the area "now or hereafter" was effective. *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.,* 202 U.S. 453, 50 L. ed. 1102; and *Vicksburg* v. *Vicksburg Waterworks Co.,* 206 U.S. 496, 51 L. ed. 1155.

When the Legislature used the precise verbiage and pursuant thereto allowed the grant to be made and a contract had, this Court must hold Appellant entitled to contract rights in Area "B" that are dominant. The State, with deference, under the decisions herein, is guilty of repudiation when it freed itself from performance of that which, through its authorized agency, it had specifically authorized.

We repeat, the franchises and statutes expressly gave non-exclusive franchises in Area "B". With the law thus fixed, Mississippi's Court cannot by misinterpretation donate to Appellee that belonging to Appellant.

IV.

The Mississippi Public Service Commission declared:

> "* * * We do not consider the municipal franchise granted Mississippi Power & Light Company by the City of Winona to be germane to any of the issues in this cause. Therefore we have disregarded the franchise completely as we believe it has no bearing on the case. The Commission, however, does not decide or pass upon the validity of the franchise or attempt to interpret or construe its provisions. The

> Commission's decision is based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Dockets No. U-44 and U-117. The first certificate does not include the disputed area. The second certificate does include the area in question."

Basically, it was questionable to what extent, if at all, the Commission could adjudicate constitutional questions, *Yazoo & M.V.R. Co.* v. *Adams*, 81 Miss. 90, 32 So. 937; and herein the Supreme Court said that these constitutional questions were without merit. Hence the Commission, assuming to adjudge, excluded the constitutional rights, and Appellant has had no hearing, as was said in *Hannah* v. *Larche*, 363 U.S. 420, 442, 4 L. ed. 2d 1307, 1321:

> " 'Due Process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. * * *."

Cafeteria Workers v. *McElroy*, 367 U.S. 886, 6 L. ed. 2d 1230.

Note that when Appellant's property was ordered destroyed, though essential to perform its obligation owed to the State, neither the State nor the City were in any wise bound by the decree, nor was Appellant heard as to the relative merits between Appellant and the other parties to the contract, Appellee being a remote grantee and not in privity. In any adjudication wherein the parties in interest were not before the Commission and the Commission proceeded to adjudge their respective rights, due process has been fundamentally violated. Compare *Hansberry* v. *Lee*, 311 U.S. 32, 85 L. ed. 22; *Chase National Bank*

v. *Norwalk*, 291 U.S. 431, 78 L. ed. 894; *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. ed. 215.

V.

The statute here for construction provides, 7 *U.S.C.A.*:

(1) Section 902:

> "The Administrator is authorized and empowered to make loans in the several States and Territories of the United States for rural electrification and the furnishing of electric energy to persons *in rural areas who are not receiving central station service* * * *."

(2) Section 913:

> "As used in this chapter the term 'rural area' shall be deemed to mean any area of the United States not included within the *boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants*, and such term shall be deemed to include both the farm and nonfarm population thereof; * * *."

As said in *Arizona* v. *California*, ... U.S. ....., 10 L. ed. 2d 542, Congressional intent does not appear from those who opposed the legislation, but those affected by this legislation are entitled, with deference, to assume as 100% accurate those things said by the bill expressly and by those who fathered its enactment, especially Senator Norris. These are ample aid for judicial construction:

Under authority granted by the Emergency Relief Appropriation Act, a temporary Rural Electrification Administration had been created by Executive Order, prior to 1936, as a means of relieving unemployment and the Act had its origin in Senate Bill No. 3483 (75th Cong., 2nd Sess.), which was designed to establish the Rural Electrification Administration on a permanent basis and for a different purpose.

The Bill was reported out by the Senate Committee on Agriculture and Forestry without hearings. However, Senator Norris, who was in charge of the Bill on the floor of the Senate, stated, in response to inquiries from other Senators, that the Bill was not intended to authorize loans *"for the purpose of electrifying a rural area which is now supplied"*; that "where a plant is now in existence which is adequately supplying a certain area with electricity none of the money provided by the Bill could be used for that purpose"; and "There is no intention of going into a farming community which is already supplied with electric current."

The report of the Senate Committee on Agriculture and Forestry states that the Committee had referred the Bill to the Secretary of Agriculture, to the temporary REA, to the Federal Power Commission, and to the Department of the Interior, and that each of these agencies had approved the Bill. (Sen. Rep. No. 1581, 74th Cong., 2nd Sess.). A number of amendments recommended by the Senate Committee had been inserted at the suggestion or request of the temporary REA (80 Cong. Rec. 2752, 2755, 2758).

The House Committee on Interstate and Foreign Commerce (Congressman Rayburn, Chairman) held extensive hearings upon the Bill as passed by the Senate. At the request of Chairman Rayburn, Mr. Cooke appeared before the House Committee, explained the Bill, and stated that he was appearing in its support. Report of Hearings, pp. 2, 4. In response to questions from members on the House Committee, Mr. Cooke testified that it was contemplated by the Bill that distribution lines would *"receive current from established utilities"*; that the bill was intended to carry on the practices of the temporary REA; that the practice of the temporary REA was to use *"the current of*

private companies or other existing plants" and to build no "*competing transmission lines*"; that it was not the purpose of the Bill "to furnish electricity or to lend money for anyone to get electricity *where it is available*"; and that the "central station service" provision was intended to authorize loans to construct facilities to serve residents of rural areas who were receiving service from "*individual Delco plants*" but did not have "*the normal service from a power line*".

In the course of the House debate, Congressman Rayburn, who was in charge of the Bill, stated:

> "May I say to the gentlemen that we are not, in this bill, intending *to go out and compete with anybody*. By this bill we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them." (80 Cong. Rec. 5283, 1936).

In the course of the House Debate, Congressman Fletcher, speaking in support of the Bill, said:

> "*There is no desire to provide loans either where service exists or where, legitimately and in truth, the power companies are about to provide service.*" (80 Cong Rec. 5308).

In an Opinion dated November 24, 1942, the Solicitor of the Department of Agriculture, in construing REA's authority to make loans "for the furnishing of electrical service to persons in rural areas who are not receiving central station service", said:

> "A study of the debates in Congress and the Committee hearings indicates that this provision was inserted because of a legislative intent to exclude loans for the purpose of paralleling existing systems and thus creating competition with established utilities."

(Opinion No. 4506, Hearings, Senate Subcommittee on Agriculture Appropriations for 1951, 81st Cong., 2nd Sess., p. 1378).

With respect to the meaning of "central station service" as used in Section 4 of the Act, W. Carroll Hunter, Solicitor of the Department of Agriculture, in Opinion No. 5247, dated November 3, 1948, said:

> "Congressional debates and committee hearings contain frequent references to the clause in question; but, as has been noted, these discussions were generally concerned with the question of competition. The term 'central station service', in itself, was generally envisioned as relating to the difference between the small Delco plant serving the individual farm (which was, clearly, not receiving 'central station service'), and the utility company's high line, carrying 2,200, 6,600 or some other common distribution voltage, which passes down the road to serve others. *This distinction serves to emphasize the point that the interest of Congress, in this provision, was to prevent competition with established utilities.* * * *."

It is judicially known that these loans to the Appellees are on a basis of 2% interest and that the current cost of money to the United States is nearly 4%. Too, that these Appellees are assumed to be tax exempt insofar as the Federal income tax is concerned and the cost to the Federal Government of this immunity is stated to be $150,000,000 by Robert T. Patterson, former professor of economics at Claremont Men's College in his book, "The Tax Exemption of Cooperatives". Besides the Appellant is compelled to pay not only Federal but State income taxes aggregating approximately 60% for the general welfare. In addition, at this date more than 98% of the farms have been electrified and are receiving all electricity they fain would have. Officials of the REA recognized that Congress expected rural electric cooperatives to be almost exclusively

distributors of electricity. In 1936, the first Administrator of the REA program told a committee of the House of Representatives that "in 99 instances out of 100 they are going to buy current from existing plants". Out of the new customers, five out of six, the Court may judicially know, are in rural territory, but are adjacent to the fast developing urban population and should be classified as such and should not, as against those who dwell within the municipality, be vouchsafed a fundamental exemption. In addition, it may be judicially noted that the REA is actively promoting generation and transmission lines at government expense, and it is claimed that the average cost from the investor-owned power companies is less considerably than that being obtained from such REA operations. Furthermore, that thereasto a profund secrecy, certainly impenetrable to Appellant, is sought to be maintained as to these matters. That here at issue is whether or not Appellant may be vouchsafed protection against those thus created and thus intended to serve.

The deference due Congressional discussion is exemplified in *United States* v. *Philadelphia National Bank*, ... U.S. ....., 10 L. ed. 2d 915, 935; and *Commissioner of Internal Revenue* v. *Church*, 335 U.S. 632, 687, 93 L. ed. 288, 321. Opinion Mr. Justice Frankfurter. Herein, the terms of the statute are express. With deference, construction is not called for. *Rosenberg* v. *Fleuti*, ... U.S. ....., 10 L. ed. 2d 1000, 1003, 1009. Those who induced Congress thus to legislate made the representations upon which, with confidence, Appellant relies. Herein Appellant is not the actor but is a property owner claiming constitutional rights. The Appellee, as actor, has had that property destroyed, those rights forfeited, when Appellee was burdened with those restraints and restrictions thus expressly and explicitly declared by Congress. That at issue is whether Appellant, thus attacked, not attacking, may in-

voke in defense the provisions expressly put in the statute and expressly explained by those who spoke with authority. *Hovey v. Elliott*, 167 U.S 409, 42 L. ed. 215. Herein, there is not, with deference, a primary question of the standing to sue. *Abington School District* v. *Schempp*, ... U.S. ....., 10 L. ed. 2d 844; *Chicago* v. *Atchison, Topeka & Santa F. R. Co.*, 357 U.S. 77, 2 L. ed. 2d 1174, cited in *Hanson* v. *Denckla*, 357 U.S. 235, 2 L. ed. 2a 1283. Both the Commission and the State Court have denied Appellant the right to interpose the provisions of this REA Act as a defense; but have expressly rewritten the Federal statute so as to authorize Appellee to preempt an area as a public utility, to oust Appellant from service therein as to persons with whom it has a constitutional right to contract, and compelled a discontinuance of valid contracts to Clinton and Winona, each being municipalities containing more than 4,000 people. This question is two-fold: (a) Has Appellant those statutory rights openly declared and publicly proclaimed? And if not, (b) May Mississippi, by its Act and its construction thereof, so subvert the Supremacy Clause as that Mississippi's statute and not the Federal statute is the law of the land? Compare *Capital Electric Power Association* v. *McGuffee*, 226 Miss. 227, 83 So.2d 837; *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So.2d 739; *Mississippi Power Company* v. *East Mississippi Electric Power Association*, 244 Miss. 40, 140 So.2d 286; *Capital Electric Power Association* v. *Hinson*, 230 Miss. 311, 92 So.2d 867; *Delta Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ..... , 149 So.2d 504; *Capital Electric Power Association* v. *Mississippi Power & Light Company*, ... Miss. ..... , 150 So.2d 534.

The interplay between Federal and State power in a question of this character can only be solved here. Ap-

pellant having relied upon the fair expressions in the statute and the honeyed expressions of those who produced the REA Act, we do protest that this Court will not permit the promise to be kept to the ear but broken to the heart. Our viewpoint is that there would be repudiation. *Perry* v. *United States*, 294 U.S. 330, 79 L. ed. 912. Burdened with the obligations inherently imposed by this statute, Appellee does not come with clean hands. Behold, contrary to the Contract Clause and the Due Process Clause, that which was Appellant's is now Appellee's under the statute.

We submit that naught contra is to be found in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 82 L. ed. 374; *Duke Power Co.* v. *Greenwood County*, 302 U.S. 485, 82 L. ed. 1240; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 83 L. ed. 543. In these cases the public utility attacked to free itself from alleged unlawful competition. Here, (a) Appellant is attacked by the Appellee who exists solely through the beneficence of the REA Act, and may not blow hot and cold; (b) more especially, Appellees, having received in trust for a specific purpose, are violating that trust to the ruin of one entitled to constitutional protection; (c) the trust having been for rural electrification, 98% has been electrified. "Ratione Cessante, cessat ipsa lex", 52 C.J. 1149; *Jefferson Standard Life Ins. Co.* v. *Noble*, 185 Miss. 360, 188 So. 289; and (d) the Nation forbade, or, at least, we claim it did, while the State commands that forbidden to be done. The line must be marked out here. *South Carolina* v. *United States*, 199 U.S. 437, 50 L. ed. 261; *New York* v. *United States*, 326 U.S. 572, 90 L. ed. 326.

Of the many cases arising in this field, this is the first one reaching this bizarre result. *Farmers Electric*

Co-op. Corp. v. *Arkansas Power & Light Co.*, 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act No. 85, and Ark. Laws 1957, Act No. 103; *City of Wichita Falls, Tex.*, v. *Bowen*, 143 Tex. 45, 182 S.W.2d 695, 154 A.L.R. 1434 (1944); *Omaha Transit Co.* v. *Briggs*, 167 Neb. 703, 94 N.W.2d 461, 28 PUR 3d 26 (1959); *Whitaker* v. *Louisville Transit Co.*, 274 S.W.2d 391 (Ky. 1954); *Rosehill Cemetery Co.* v. *City of Chicago*, 352 Ill. 11, 185 N.E. 170, 87 A.L.R. 742 (1933); *Deneen* v. *Houghton County St. Ry. Co.*, 150 Mich. 235, 133 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); *Public Service Co.* v. *Public Utility Comm. of Colorado*, 142 Colo. 135, 350 P.2d 543 (1960); *Clarke-Washington Electric Membership Corp.* v. *Alabama Power Co.*, 272 Ala. 598, 133 So.2d 488 (1961); *Duke Power Co.* v. *Blue Ridge Electric Membership Corporation*, 253 N.C. 596, 117 S.E.2d 812, 37 PUR 3d 396; *Pee Dee Electric Membership Corporation* v. *Carolina Power & Light Company*, 253 N.C. 610, 117 S.E.2d 764, 37 PUR 3d 387; 256 N.C. 56, 122 S.E. 761; see also *Texas ex rel. Southwestern Gas & E. Co.* v. *Upshur Rural Electrical Coop. Corp.*, (1957) 156 Tex. 633, 638, 18 PUR 3d 53, 57, 298 S.W.2d 805, 808; *Town of Coushatta et al.* v. *Valley Electric Membership Corporation*, (La. Appeals, 1962) 139 So.2d 822. See also *Russell* v. *Sebastian*, (1914) 233 U.S. 195, 209, 34 S. Ct. 517, 58 L. ed. 912, 923; followed in *Southern Bell Telephone & Telegraph Co.* v. *City of Meridian*, (1961) 241 Miss. 678, 131 So.2d 666, 673.

WHEREFORE, with deference, jurisdiction exists here by appeal; the questions are substantial; and rectification should be wrought by the only Court charged with this duty; but if certiorari should be applicable, then it is hereby prayed for and the Court asked to grant the writ

and deal appropriately with the Federal questions in this Jurisdictional Statement set forth.

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PROOF OF SERVICE

I, Garner W. Green, of the firm of Green, Green and Cheney, attorneys of record for Mississippi Power & Light Company, depose and say that on the ..... day of ....., 1963, I served a copy of the foregoing Jurisdictional Statement on T. Harvey Hedgepeth, Esquire, attorney of record for Capital Electric Power Association, by mailing same, postage prepaid, to his address at Deposit Guaranty Bank Building, Jackson, Mississippi; and on Hardy Lott, Esquire, 226 Aven Building, Greenwood, Mississippi, attorney of record for Delta Electric Power Association, by mailing same, postage prepaid; and in the same manner served a copy upon the following who were Amici Curiae in the Supreme Court of Mississippi: R. B. Deen, Jr., Esq., Dixie Towers, Meridian, Mississippi, attorney for East Mississippi Electric Power Association; Everette Truly, Esq., City Bank Building, Natchez, Mississippi, attorney for Southwest Mississippi Electric Power Association; A. A. Cohn, Esq., Panzica Building, Brookhaven, Mississippi, attorney for Magnolia Electric Power Association; O. F. & J. O. Moss, Esq., Lucedale, Mississippi, Attorneys for Singing River Electric Power Association; D. H. Waits, Esq., North Broad Street, Leland, Mississippi, attorney for Twin County Electric Power Association; John K. Keyes, Esq., Collins, Mississippi, attorney for Southern Pine Electric Power Association; David C. Welch, Esq., Gardiner Center Offices, Laurel, Mississippi, attorney for Dixie Electric Power Association; J. P. Stone, Esq., Coffeeville, Mississippi, attorney for Tallahatchie Valley Electric Power Association; Semmes Luckett, Esq., 121 Yazoo Avenue, Clarksdale, Mississippi, attorney for Coahoma Electric Power Association; Coast Electric Power

Association, Bay St. Louis, Mississippi; Pearl River Valley Electric Power Association, Columbia, Mississippi.

Sworn to and subscribed before me, this the ..... day of ....., 1963.

Notary Public

My Commission Expires:

APPENDIX

APPENDIX "1-A"

No. 42,535

IN THE SUPREME COURT OF MISSISSIPPI
DELTA ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL

'ETHRIDGE, JUSTICE:

This case involves an order of the Mississippi Public Service Commission (called Commission), directing Mississippi Power & Light Company (called Company) to cease and desist from rendering electric distribution service or street lighting service in a newly annexed area of the City of Winona, which was certificated by the Commission to Delta Electric Power Association (called Delta). The Mississippi Municipal Association was allowed to intervene. It supported the position of the Company.

The Company and Municipal Association appealed from the Commission's order to the Chancery Court, First Judicial District of Hinds County, which reversed it. That court held that Delta had no right to operate in the disputed area, and ordered Delta to cease and desist from doing so. It adjudicated that the Company's municipal franchise, upon expansion of the city limits, extended into the newly incorporated area, and thereby superseded Delta's certificate from the Commission, issued when the disputed area was outside the city limits.

The facts are without any substantial dispute. The issues are principally those of construction of Section 5 of the Public Utility Act of 1956, in the light of the facts and

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several prior decisions. Miss Laws 1956, Ch. 372; Miss. Code 1942, Rec. Secs. 7716-01 to 7716-38. We conclude the Commission's order was correct, reverse the decree of the Chancery Court, and reinstate and affirm the Commission's issuance of a cease and desist order.

The precise issue is whether, under the Act, the expansion of the city limits extended Company's service area into the annexed area, under its municipal franchise granted prior to the 1956 Act and before the expansion, and superseded the prior grandfather certificate to the annexed tract, granted by the Commission to Delta, which served the area before it came within the city limits. We think it did not, and that Delta's certificate was properly protected by the Commission's order.

Both Delta and Company are public utilities engaged in the transmission and distribution of electricity, and subject to the Public Utility Act of 1956. Miss. Laws 1956, Ch. 372, Sec. ID. Delta is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474(8). It has the power of eminent domain. Sec. 5474(6) (14). Delta has the obligation and duty to render non-discriminatory service to all persons subscribing for it, who live in the areas served by that corporation. Capital Elec. Power Assn. v. McGuffee, 226 Miss 227, 83 So.2d 837 (1955). It operates in thirteen counties in the state.

Mississippi Power & Light Company, a subsidiary of Middle South Utilities, is incorporated under the laws or Florida, and qualified to do business in Mississippi. All of its property is located in this state, generally in the western one-half from the Tennessee to the Louisiana line.

Delta was incorporated in 1938. In 1940 it constructed an electric line in the vicinity of, but outside the west corporate limits, of the City of Winona. There were no other electric lines in this area, and electric services was not then available to anyone in this rural area. Delta served the only two customers in it who desired electricity at that time. After it was made available, and as a result of this and other factors, this area west of the city limits slowly developed, over a period of years, and Delta obtained other customers. It served all of these additional customers.

On February 23, 1948, the City of Winona granted a franchise to Mississippi Power & Light Company for electric service in that municipality, its streets and public places, "as they now exist or may hereafter be laid out or extended." This franchise was for a period of twenty-five years, so it expires in 1973. Since 1948 Company has been furnishing electric service in Winona under that franchise. During this same period and since 1940, Delta has been furnishing electric service to those desiring it in the disputed area which was west of the city limits prior to December 31, 1959.

In 1948 the City made a street lighting agreement with the Company, for five years, and renewable for similar additional periods unless either party elected to terminate it. That contract is still in effect.

The Public Utility Act became effective on March 29, 1956. Miss. Laws 1956, Ch. 372, Sec. 40. Before that date there was no statewide regulation by the Public Service Commission or any other state agency of the service areas, rates, or related operations of electric public utilities. Subject to certain limitations, the act vested "exclusive original jurisdiction" over these matters in the Commission. *Ibid.*, Sec. 4.

Section 5(b) provides for grandfather or prior service certificates of convenience and necessity. It states that the Commission shall issue such a certificate to any person engaged in the operation of electric facilities and equipment "for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation," if the application was made within six months after the effective date of the act. Both Delta and the Company filed applications within the six months, and thereafter negotiated over a lengthy period for the purpose of agreeing on areas which they should recommend to the Commission for certification to Delta and Company, respectively. They agreed that the disputed area involved in this suit should be certificated to Delta and that certain other areas should be certificated to Company. Hence they submitted to the Commission a letter of agreement, and map showing the recommended areas of agreement for prior service certificates.

On November 25, 1959, all of the disputed area involved in this suit was certificated to Delta. The Company was a party to that proceeding, did not appeal from it, and the Commission's order, granting the grandfather certificate to Delta, became final. Delta has continued since that date to serve every electric customer in the area, including two street lights for the City of Winona. Delta's grandfather certificate from the Commission describes the disputed area involved in this suit by metes and bounds, and clearly covers it.

By an ordinance effective December 31, 1959, the City of Winona extended its corporate limits to the north, south, and to the west. The disputed area here involved is part of the western expansion of the city limits, annexed on that date to the municipal boundaries of Winona.

In May, 1960 the Company, without any authorization from the Commission, constructed an electric line into the disputed area, previously certificated by the Commission to Delta, extended it to the Hightower property, and in June, 1960 constructed two prongs from this line in the disputed area for the purpose of serving street lights. No electric service was actually rendered to the Hightower property. The street lights were operated for several weeks, when the bulbs were removed.

On May 31, 1960 Delta filed the present petition before the Commission, asking it to order the Company to remove its line from Delta's area and to cease and desist offering its electric service to service locations within areas certificated to Delta. The Company filed its answer and cross-petitioned. It took the position that extension of the city limits expanded its precedent franchise from the city to cover the newly annexed area.

After a lengthy hearing, the Commission's supplemental and amended order of July 18, 1961 ordered the Company to cease and desist from offering electric service and operating facilities within the disputed area. It denied the cross-petition. The Commission found that Delta's certificate of November 25, 1959 contained a particular legal description of the area certificated to Delta, which included the disputed area; that the Company did not appeal from the order granting Delta that certificate; that since March 29, 1956 Delta has been rendering reasonably adequate electric service within the disputed area; and the Company's certificate did not include any part of that area certificated to Delta. The Commission stated it did not consider the municipal franchise granted to the Company by Winona to be germane to the issues, and did not pass upon the validity of that franchise. It ruled

solely on the respective rights of the parties arising out of their certificates of convenience and necessity.

I.

Prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of grandfather certificates under Section 5 are made on an area rather than a facility basis; (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts.

An electric power association is under an obligation to render electric service upon a nondiscriminatory basis to its members and to other persons living in the area. Capital Electric Power Assn. v. McGuffee, 226 Miss. 227, 243, 83 So.2d 837, 84 So. 2d 793 (1956). A non exclusive franchise is a valuable right which can be protected in the courts. Miss. Power Light Co. v. Miss. Power District, 230 Miss. 594, 611, 93 So. 2d 446 (1957); Payne v. Jackson City Lines, Inc., 220 Miss. 180, 70 So. 2d 520 (1954).

In Miss. Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 106 So. 2d 375 (1958), it was held that a revenue bond issue, to provide funds for acquisition of electric distribution facilities in a municipality, was void because of defective notice. Whether an electric power association should be permitted to "invade an area" already having electric utility service furnished by the company was first for determination by the Commission. The opinion discussed briefly Section 5 of the Act, recognized the right under Section 5 (b) to a grandfather certificate, and observed that under the second paragraph of Section 5 (d) provision is made for more than one utility operating within a municipality. 234 Miss. at 634.

United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946 the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature "reserved the right to pass such laws as may be expedient or necessary in municipal affairs." The 1956 Act superseded pro tanto the precedent franchise to United. The legislature, acting under its police power, had the right to vest in the Commission power to determine rates.

Capital Electric Power Assn. v. Miss. Power & Light Co., 240 Miss. 139, 125 So. 2d 739 (1961) (called the Elton case), spelled out in some detail the rights of a holder of a certificate of public convenience and necessity from the Commission. The Elton Company operated a wood-shipping plant three miles south of the City of Jackson. Capital Electric had been serving the area for 17 years, and obtained from the Commission a grandfather certificate under the 1956 Act, which covered the area involved. Nevertheless, Miss. Power & Light Company applied for a certificate to construct lines to Elton, pursuant to its contract with it. The Commission's issuance of a certificate to Mississippi Power was affirmed by the circuit court, but on appeal that judgment was reversed.

Section 5 of the Act was discussed in some detail. Capital Electric was "obligated to render non-discrimina-

tory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor." Hence it was said that, having served the electric requirements in this area for 17 years, Capital Electric under Section 5(b) acquired the right to a certificate, "being in truth and in fact a franchise from the State. Such right is indeed a valuable one", although nonexclusive. By the Act "it was the intention of the legislature that facilities of one utility should not be duplicated in the same area"; that there should not be "duplication and overriding facilities and certificates." Hence it was said "An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear."

For emphasis, it was stated: "There should no longer be any doubt as to the rule in this State on that proposition." The Commission could not disregard the requirements of a grandfather certificate under Section 5(b). In summary, the opinion held: "To allow the invasion of Capital Electric's area on account of the desire of Elton Company, regardless of their reasons therefor, to be served by Mississippi Power & Light Company would lay down a principle which would result in endless duplication and make a shamble of the utility act. Such a policy cannot be countenanced by this Court."

Miss. Power Co. v. East Miss. Elec. Power Assn., 140 So. 2d 286 (Miss. 1962), involved principally an area within one mile around and adjacent to the City of Louisville. Louisville's Electric System contended that, under Sec. 1H of the Act, it had the sole right and privilege of operating within the one mile corridor. That provision stated that any public utility owned by a municipality should not be sub-

ject to the provisions of the Act, except as to extensions of utilities greater than one mile outside of corporate boundaries after the effective date. This provision was not a grant, but an exemption from regulation, limited in terms.

East Mississippi had been serving the outside area prior to and on the Act's effective date. It was held the legislature did not intend by this exemption "to take from a company that was operating within said corridor on the date of the Act its right to operate therein," and the Commission was justified in certificating the area to East Mississippi. Whether its certificate could be invaded depended upon whether the Commission found it rendered inadequate service, and failed to remedy it. The award of a certificate, it was held, is made on an area rather than a facility basis. *Capital Electric* so held. Moreover, East Mississippi was a public utility in statutory contemplation. Cf., Miss. Public Service Commission v. Holloway Transfer & Storage Co., No. 42,476, decided January 14, 1963 (Motor Vehicle Act).

In short, prior decisions under the Public Utility Act of 1956 hold that certificates to public utilities are based on an area basis, are valuable rights, although nonexclusive, entitled to protection of the courts, and the Commission (under Section 4) has "exclusive original jurisdiction over the intrastate business and property of public utilities." Cf., Miss. Code 1942, Rec., Secs. 5490-5497 (1938 preemption statutes for power assns.)

II.

Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think

the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not Consistent with the terms of the Act or with the legislative purposes.

The title of Ch. 372, Laws of 1956, states it is an act to "vest authority" in the Commission "to regulate certain public utilities." The preamble reveals legislative concern with utility services "both within and outside of municipalities," and the purpose to vest controlling power in the Commission "to regulate such utilities' rates and services." Section 4 gives it "exclusive original jurisdiction," with certain exceptions. There is no indication that a municipal expansion of boundaries would supersede a prior certificate from the Commission.

Subsection (d) of Section 5 is aimed at the precise issue involved here: "Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein.

Subsection (d) recognizes that two public utilities, such as Delta and Company, may hold certificates for similar operations in the same municipality. It authorizes operations to be carried on by them "within their respective certificated areas," and exempts them from further application for extension of their facilities within their "respective certificated areas of said municipality, including any extensions of the corporate limits thereof." In other words if such utilities extend or add to their facilities within their respective certificated areas of the city, which would include extensions of corporate limits of the city, they are exempt from further application to the Commission for such extensions or additions. This assumes the annexed areas are within the respective certificated areas of the two utilities.

The second paragraph of subsection (d) recognizes that both "co-operatives" and other utilities may operate within a municipality at the same time, and in such event they are subject to rate regulation. In short, subsection (d) specifically applies to and recognizes the existence of a situation such as that here presented, where Delta and the Company have respective certificated areas in the municipality, under the extension of the city limits. Section 5 (d) applies to certificate holders for areas subsequently annexed to municipalities. This is evidenced from the phrase, "including any extensions of the corporate limits thereof."

Subsections (b), (c), and (d), of Section 5, must be read together. Subsection (b), mandatory in nature, requires the Commission to issue a grandfather certificate where a person, as defined, is engaged in the operation of facilities on the effective date of the Act, March 29, 1956. Subsection (c) provides that "in all other cases" the Commission shall have a hearing on certificate applications, "provided, however, no certificate shall be required for

extensions or additions within the corporate limits of a municipality *being served by the holder of a certificate of convenience and necessity, . . .*" (emphasis supplied) Hence if there is only one holder of a certificate within a municipality, then it can construct extensions anywhere in the corporate limits without further application to the Commission. However, under subsection (d), where there are two holders of certificates in the same municipality, then each holder is only exempt from further application to the Commission for extensions *within its own certificated area* of the municipality.

The quoted part of subsection (c), upon which Company relies, must be considered along with subsection (d). When read together, the foregoing interpretation renders both subsections consistent with one another, the terms of the statute, and a reasonable exercise of legislative discretion. Accordingly, under subsection (d), when there were two persons holding valid certificates for electric operations in separate areas in Winona, as extended, these certificate holders had the right to carry on their operations in their respective certificated areas within the municipality, without making further application to the Commission for extensions and additions of their facilities, within their respective certificated areas.

The reference in subsection (d) to "respective certificated areas" reflects a legislative intent to exempt the holder of a certificate, and not the holder of a municipal franchise. Throughout Section 5, the statute uses the words "certificate" and "franchise" correctly and distinctly. If the legislature had intended to exempt the holder of a municipal franchise, then it would have used the term "municipal franchise" instead of the word "certificate." When it referred to extensions "within their respective certificated areas," it intended areas which had

been certificated by the Commission, not areas for which a municipal franchise only had been issued. If it had intended the latter, it would have said so.

Furthermore, subsection (b) made it mandatory for the Commission to issue a certificate to Delta for the areas it was serving outside the then corporate limits of Winona. The legislature knew that corporate limits sometimes expand. If it had intended the Commission should not issue certificates for areas near corporate limits, in view of possible future expansions, then presumably it would have so stated, and not used the mandatory language of subsection (b).

The phrase "municipal franchises" is used numerous times in Section 5. Yet it does not provide that when a certificated area is taken within a municipality, the Commission's certificate would be cancelled. The clear inference is that the legislature did not intend that result. Moreover, there is no provision that, after a certificate has been issued by the Commission, it shall be necessary, after corporate limits are extended, for a municipal franchise also to be obtained.

Nor is there any direction that a municipal expansion shall cancel or in any way affect a Commission certificate. The exclusive method for cancellation of such a certificate is prescribed in subsection (f), Section 5, where a utility is not rendering reasonably adequate service, and fails to do so after ordered to correct it. Yet Company's argument would add an additional ground for cancellation of a Commission certificate, namely, where a municipality has extended its corporate limits into a previously certificated area. The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods. 50 Am. Jur., Statutes, Secs. 244-

46; Tepper Bros. v. Buttross, 178 Miss. 659, 664, 174 So. 556 (1937).

The next to last sentence of subsection (e) contemplates power associations operating within a city and paying for that privilege. It says that any co-operative operating "within *any area of* a municipality" shall pay it two percent of gross revenue from inside sales. Furthermore, the first sentence of Section 5 provides that no person shall construct, acquire or operate equipment for distribution of electricity "without first having obtained from the Commission a certificate." There is no exception which would authorize a municipality, by issuing a franchise, to excuse this requirement of a certificate.

Subsection (e) recognizes that a public utility, which holds "a certificate of convenience and necessity granted under the provisions of this act covering the geographical area of such municipality," may after the expiration of a "municipal franchise" continue to use the streets upon condition of payment of compensation therefor at the rate of two percent of sales to customers within the city. Nevertheless, the utility must have a certificate from the Commission.

Subsection (g) of Section 5, upon which Company particularly relies, has a restricted application. It constitutes a limitation on the Commission, as of the time of issuing a certificate, for an area which at that time is in a municipality. It prohibits the Commission from issuing to a utility a certificate for an area *then* in a municipality, unless the utility has a franchise from the municipality. It presupposes the pending application is for a certificate. Here Delta is not seeking a certificate for any service territory. It already has a valid certificate covering the disputed tract, granted to it by the Commission before the expan-

sion of the city limits, and at a time when no part of the area was within the corporate limits.

Subsection (g) also presupposes that an applicant for a certificate within a municipality has a municipal franchise, which it must attach to its application. Moreover, it does not require that any further application be filed after a certificate is once granted by the Commission. This construction is further supported by the third sentence of subsection (g). It states that if a municipality arbitrarily refuses to grant a franchise to a utility "now operating within said municipality," then the utility can obtain a Commission certificate for a municipal area without having a franchise. See Miss. Valley Gas Co. v. City of Jackson, 236 Miss. 81, 109 So. 2d 637 (1959). The phrase "now operating" refers to the effective date of the Act, March 29, 1956. No similar relief was provided for a utility holding a certificate for an area outside of a municipality, which is taken into it after that date, and the franchise arbitrarily is denied. This omission warrants the conclusion the legislature intended that, when a certificate was once validly granted, (as it was to Delta), it would remain valid even though the area was subsequently annexed by a municipality; and that such annexation would not make it necessary for the utility to apply again for the area already certified to it. If that were not so, the legislature as a matter of equality would have afforded presumably the same relief from arbitrariness to a utility whose certificated area was brought into a city by a municipal expansion.

III.

In the drafting of Section 5 of the Act, the legislature was aware manifestly of municipal franchises, Commission certificates, and extensions of corporate limits. It mentioned all of them in the Act. If it had intended that

extension of municipal limits would cancel, modify, or affect in any way a certificate of convenience and necessity from the Commission, it no doubt would have provided for such cancellation. There is no such directive. To read into the Act a requirement that any extension of municipal limits would cancel *pro tanto* a certificate from the Commission would be unwarranted.

Moreover, it would impute to the legislature an intent inconsistent with its purpose to avoid duplicating facilities. The dominant policy which the legislature had in view must be considered. See Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768 (1935); Sheffield v. Reece, 201 Miss. 133, 143, 28 So.2d 745 (1947); Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 510-511, 62 So. 2d 772 (1953). This maintains the *status quo* in the disputed area.

Subsection (d) authorizes two electric utilities to serve separate certificated areas in the same municipality. This would result in no duplication or inconvenience, the legislature apparently concluded, although the contrary might well be the case where two transit companies are serving in one city. At any rate, subsection (d) of Section 5 makes it clear that two utilities may hold certificates from the Commission for separate areas in the same municipality. The legislative history in the Senate, as reflected in the Journal, is too sketchy and indefinite to be of assistance in the Act's interpretation on the present issues. Miss. Senate Journal, 1956, pp. 327, 329, 353-359, 391, 405-408, 510, 540-542, 575. Moreover, the statute as finally enacted is the controlling guide.

A municipality in Mississippi is a creature of the State. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant

utility franchise and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs. 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation.

All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to Company, did not supersede Delta's certificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power over areas then outside of municipalities, nor its power to control and regulate municipal activities.

Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. So. Bell Tel. & Tel. Co. v. Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

IV.

Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise

of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26 (d) (scope of review).

There was no error in the Commission's overruling Company's plea to its jurisdiction, and the motion to dismiss Delta's petition. Appellant did not seek any relief against the City of Winona. It only sought an order directing Company to remove its lines in the disputed area, relying upon its certificate from the Commission. Hence the city was not a necessary party to the suit. Moreover, at Company's instance, the Commission struck from Delta's pleading allegations attacking validity of the franchise, and properly ruled that it had no power to pass upon that issue.

Stegall v. City of Jackson, 141 So. 2d 236, 143 So. 2d 298 (Miss. 1962), does not affect this case. It held only that land developers who, without authority, laid sewer lines in streets and county roads, without any recorded reservation, dedicated that system to the public use, and could not recover its value from the city which annexed the area. However, *Stegall* (141 So. 2d at 241) referred to Gwin v. City of Greenwood, 150 Miss. 656, 115 So. 890, 58 A.L.R. 849 (1928), which has some relevancy here. There the owner of a subdivision outside of the city limits dedicated the streets, but reserved the exclusive right to operate water and sewer lines thereon. Later the city extended its boundaries to include this area. It was held

the municipality had no right to enjoin Gwin from interfering with its extension of water mains. The reservation in the dedication reserved in the dedicator a private right of property, wher the reservation was made before the area was brought into the city limits.

Appellees argue as analogous precedents from other states several cases in which municipalities have extended their boundaries, affecting previously acquired utility rights in the annexed area. Farmers Electric Co-op. Corp. v. Ark. Power & Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act. No. 85, and Ark. Laws 1957, Act. No. 103; Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944); Omaha Transit Co. v. Briggs, 167 Neb. 703; 94 N.W.2d 461, 28 PUR 3d 26 (1959); Whitaker v. Louisville Transit Co., 274 S.W. 2d 391 (Ky. 1954); Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N.E. 170 (1933); Deneen v. Houghton Co. St.-Ry. Co., 150 Mich. 235, 113 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); Public Service Co. v. Public Utility Comm. of Colo., 142 Colo. 135, 350 P. 2d 543 (1960); Clarke-Washington Elec. Membership Corp. v. Ala. Power Co., 272 Ala. 598, 133 So. 2d 488 (1961). These cases are not persuasive here. They are based essentially upon the particular statutes and constitutional provisions of the specific states. They involve issues and statutes different from those arising under the Public Utility Act of 1956.

In summary, on the direct appeal by Delta, the judgment of the chancery court, which reversed and set aside the order of the Public Service Commission, is reversed. The order of the Commission is reinstated and affirmed. Appellees' cross appeal on the jurisdictional issue is without merit. Hence on the cross appeal the case is affirmed.

ON DIRECT APPEAL, REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED: ON CROSS APPEAL, AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "1-B"

No. 42,480

IN THE SUPREME COURT OF MISSISSIPPI
CAPITAL ELECTRIC POWER ASSOCIATION

Vs.

MISSISSIPPI POWER & LIGHT COMPANY AND
CITY OF CLINTON, MISSISSIPPI, ET AL.

KYLE, JUSTICE:

This case is before us on appeal by Capital Electric Power Association from a decree of the Chancery Court of the First Judicial District of Hinds County, reversing a cease and desist order issued by the Mississippi Public Service Commission on July 6, 1961, upon the petition of Capital Electric, ordering that Mississippi Power & Light Company cease and desist from rendering electric service or street lighting service in an area recently annexed to the City of Clinton, which had been certificated to Capital Electric by the Public Service Commission.

The record shows that Capital Electric Power Association is a Mississippi Corporation organized and existing under authority of the Electric Power Association Act of 1936, Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is a public utility engaged in the transmission and distribution of electricity for lighting, heating and power purposes, and is vested with authority to operate electric services both in and without municipalities. Code Sec. 5478(8). It has the power of eminent domain. Sec. 5474 (16) (14). Capital Electric operates in parts of seven counties in the

central part of the state, including the area lying east of the City of Clinton in Hinds County, and is obligated to render nondiscriminatory service to all persons living in its service areas who apply for such service.

The area involved in this controversy is an area approximately 1/4 mile wide, east and west, and 1/2 mile long, north and south, lying immediately east of the corporate limits of the City as the same existed prior to March 25, 1960. The area is bounded on the north by the right of way line of Clinton Boulevard, on the west side by the city limits as they existed prior to March 25, 1960, and on the south by old U.S. Highway No. 80, and on the east by the north-south half section line running through Section 28, Township 6 North, Range 1 West. The area is referred to in the record and in the briefs filed on this appeal as the "disputed area"; and will be referred to by us in the same manner.

The record shows that Capital Electric began to furnish electric service to persons desiring such service in the disputed area in 1944, and has continued to serve all persons applying for such service since that time. Lines have been added as needed. Such service was being furnished to 14 subscribers, including residential, church and commercial, at the time of the hearing of this cause. Neither Mississippi Power & Light Company nor any other electric utility had ever furnished electric service to subscribers in the area prior to the annexation of the area by the City of Clinton on March 25, 1960, except residents of two dwelling houses located on the extreme northern edge for which electric service had been provided by the Company for two of its employees prior to the enactment of Ch. 372, Laws of 1956, and which were "frozen" by agreement of the parties and an order of the Public Service Commission dated September 21, 1959.

The record shows that, after the enactment of the Public Utility Act, Ch. 372, Laws of 1956, which became effective March 29, 1956, Capital Electric filed with the Public Service Commission under authority of paragraph (b) of Section 5 of the Act, commonly called the "grandfather" clause, its application for a certificate of public convenience and necessity authorizing it to continue its operations as a public utility serving the designated areas which were being served by it on the effective date of the Act. The application was entered upon the docket of the Commission as Docket No. U-84. Mississippi Power & Light Company was made a party to the proceeding. After extended negotiations between Capital Electric and the Company for the settlement of area claims, the Commission, by an order entered in Docket No. U-84 on September 21, 1959, granted to Capital Electric a certificate of public convenience and necessity, covering the areas which were being served by it on the effective date of the Act, including the area involved in this controversy. The area certificated to Capital Electric as its service area was described in the order of the Commission by metes and bounds and included the area involved in this controversy. No petition for a rehearing was filed, and no appeal was taken from the final order of the Commission in that matter; and thereafter Capital Electric continued to furnish electric service to its subscribers in the area. The record shows that Capital Electric does not have and has never had a municipal franchise in the City of Clinton. It does not have and has never had a street lighting agreement with the City of Clinton. However, the record shows that a written offer was made by Capital Electric to the City on August 23, 1960, to furnish street lighting service to the City in the disputed area on the same terms as such service was being rendered by Mississippi Power & Light Company.

The record shows that the appellee, Mississippi Power & Light Company, hereinafter referred to as the Company, is an investor-owned public utility incorporated under the laws of the State of Florida and qualified to do business in the State of Mississippi. All of its property is located in the western half of the state. Its general offices are located in the City of Jackson. The Company has operated in Mississippi since 1924. Its current franchise, authorizing the use of the streets, highways and public places in the City of Clinton, was granted by the City on December 6, 1946, for a period of 25 years. On December 16, 1946, the governing authorities of the municipality approved an exclusive street lighting contract with the Company, which provided that, "Company will furnish and municipality will take and pay for its entire street lighting service during the term of this agreement." The contract had been in effect continuously from December 16, 1946, to the date of the hearing.

On November 25, 1959, the Public Service Commission, in Docket No. U-44, granted to the Company a "grandfather" certificate of public convenience and necessity, pursuant to the provisions of paragraph (b) of Section 5, of the Public Utility Act, covering numerous areas in various parts of the state, including the area lying within the corporate limits of the City of Clinton, but not including the area involved in this controversy which at that time was not a part of the City. As in the case of Capital Electric, the Company's "grandfather" certificate described the service areas of the utility by metes and bounds.

The events leading up to the filing by Capital Electric of its petition against the Company in this cause asking for a cease and desist order were substantially as follows: The decree of the Chancery Court of the First Judicial

District of Hinds County, approving the extension of the city limits of the City of Clinton so as to include within the City the area involved in this controversy, along with certain other small areas lying outside of the City, became final on March 25, 1960. On May 3, 1960, the mayor and board of aldermen of the City adopted a resolution authorizing the mayor and clerk to execute in behalf of the City a supplemental agreement with the Company for the furnishing of street lighting in the newly annexed territory. The city clerk thereupon addressed a letter to the Company's manager designating certain locations for new street lights to be installed by the Company on Morrison Drive, and on May 16, 1960, the Company's workmen entered the disputed area and erected a distribution line covering a distance of 1775 feet. The line entered the disputed area on the north at the intersection of the south right of way line of Clinton Boulevard and Morrison Drive and ran in a southerly direction along Morrison Drive to the north right of way line of U.S. Highway 80. The line was built immediately across the street from Capital Electric's line and duplicated Capital Electric's line. The Company also installed five street lights, four of which were located directly across the street from street lights already provided by Capital Electric, which were then in operation. The Company also installed a permanent service line into the newly constructed residence of C. M. Kelley, where Capital Electric Service was already being used for construction purposes.

On May 25, 1960, Capital Electric filed its petition in this cause with the Public Service Commission and asked that, upon the hearing of the petition, the Commission enter an order directing the Company to remove the line so constructed by it in the disputed area, and directing that the Company cease and desist offering its service to serv-

ice locations or constructing service facilities within the disputed area. Capital Electric also asked for general relief.

The Company filed its answer to the petition on July 22, 1960. In its answer the Company admitted that on May 16, 1960, it had built the line in question within the disputed area, and that it had served the owner of one residence from that line and had also installed along Morrison Drive five street lights. As matters of affirmative defense, the Company alleged that it was operating under a franchise from the City of Clinton dated December 16, 1946, which was a 25-year franchise and that the rights and obligations conferred by the City upon the Company by that franchise were protected by Ch. 372, Laws of 1956, and particularly by paragraph (g) of Section 5 thereof. The Company further alleged that it was the only supplier of electric energy operating in the City or any part thereof to which a franchise had been granted by the City, and that it was paying the City two per cent of its domestic and commercial receipts derived from its operations within the City. It alleged that Capital Electric had applied to the City for a franchise, and that the mayor and board of aldermen had refused to grant the same.

The Company further alleged that it had received on November 25, 1959, in Cause No. U-44, a "grandfather" certificate to serve the City of Clinton, pursuant to Section 5(b) of the Public Utility Act; that it had an exclusive street lighting contract with the City under which it was presently operating; that its right to furnish electric service in the area which had been incorporated into the city was protected by the due process clause and equal protection clause of the Constitution of the United States and the due process clause of the Mississippi Constitution. The Company alleged that it had offered to purchase from Capital Electric, or to trade with Capital Electric for other

facilities located elsewhere, all facilities which Capital Electric had in the City of Clinton. The Company incorporated in its answer a cross petition in which it asked that Capital Electric be ordered to cease and desist from maintaining its electric distribution service in the disputed area, and to remove its equipment and distribution facilities from the area.

The Mississippi Municipal Association filed a petition asking that it be permitted to intervene on behalf of the municipalities of the state as parties interested in the litigation. The City of Clinton also filed a petition asking that it be permitted to intervene as an interested party. Both petitions were granted by orders of the Commission dated September 16, 1960. The Municipal Association then filed its answer to the petition of Capital Electric; and the City of Clinton filed an answer and cross-petition in which it averred that Capital Electric had no right to continue to operate its facilities in the disputed area after March 25, 1960, for the reason that it had never been granted a franchise to operate within the City.

Extended hearings were held by the Public Service Commission on the issues presented by the pleadings. The hearings were concluded on February 27, 1961. The Commission took the case under advisement, and on July 6, 1961, the Commission rendered its decision in favor of Capital Electric and entered a cease and desist order as prayed for in Capital Electric's petition. The relief prayed for in the cross petitions filed by Mississippi Power & Light Company and the City of Clinton was denied, and the cross petitions were dismissed.

The Commission in its order found that Capital Electric had been granted a certificate of convenience and necessity by the Commission in Docket No. U-84 on September 21, 1959, which authorized it to continue to operate

its electric facilities and serve the needs of electric consumers in the area that it was serving on March 29, 1956, the effective date of the Public Utility Act; that the certificate of convenience and necessity contained a particular description of the area involved in this litigation; and that continuously, since March 29, 1956, Capital Electric had been rendering reasonably adequate electric service within the area. The Commission found that the new facilities constructed by Mississippi Power & Light Company in the disputed area were within the areas specifically certificated to Capital Electric by the Commission in Docket No. U-84; and that the Company, unless ordered to cease and desist therefrom, would offer and render electric service to consumers of electric power within the disputed area, and would continue to render street lighting service within the area; that the real issue in the controversy was whether or not the holder of a certificate of convenience and necessity issued by the Commission was entitled to be protected against an invasion of its certificated area by the construction and operation of electric facilities therein by another electric utility which did not have a certificate authorizing it to serve the area. The Commission was of the opinion that the municipal franchise granted to the Company by the City of Clinton was not germane to any of the issues in the cause and had no bearing on the case. The Commission did not pass upon the validity of the franchise or attempt to construe its provisions.

The Commission, by an order duly entered upon its minutes, ordered that the respondent, Mississippi Power & Light Company, cease and desist from rendering any electric distribution service or street lighting service in the disputed area, and that the Company remove "all of its electric lines and facilities, which it has constructed

and is now operating and maintaining within the disputed area," within a period of 30 days from the date of the order. In its order the Commission stated that its decision was based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket Nos. U-44 and U-84; that the first certificate did not include the disputed area; that the second certificate did include the area in question. From that order the respondent, Mississippi Power & Light Company, prosecuted an appeal to the Chancery Court of the First Judicial District of Hinds County. The City of Clinton and the Mississippi Municipal Association likewise prosecuted appeals.

The cause was heard by the chancery court as an intermediate court of appeals upon the voluminous record made during the hearing before the Commission, and on April 20, 1962, that court entered a judgment reversing the order of the Public Service Commission and ordering that the petition of Capital Electric for a cease and desist order be dismissed. The court was of the opinion that the order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton; that, when the City of Clinton extended its corporate limits and annexed adjoining areas which included the disputed area in this cause the certificate of convenience and necessity granted to Capital Electric under the Public Utility Act of 1956, in so far as it covered the disputed area, became ineffective and Capital Electric could not operate within the corporate limits of the City inasmuch as it had not been granted a franchise by the City. The cause is now before us on appeal by Capital Electric from the judgment entered by the chancery court reversing the order of the Commission.

The attorneys for Capital Electric have assigned and argued four main points as ground for reversal of the judgment of the lower court:

(1) That the court erred in holding that when the City of Clinton expanded its corporate limits on March 25, 1960, and annexed the disputed area, the certificate of public convenience and necessity theretofore issued by the Public Service Commission to Capital Electric, under and pursuant to Section 5(b) of the Public Utility Act of 1956, became ineffective in so far as it covered the disputed area; (2) that the court erred in holding that the expansion of the corporate limits of the City of Clinton on March 25, 1960, destroyed the vested service rights acquired by Capital Electric by virtue of its having served the disputed area for many years prior to that date, which rights had been recognized and expressly reserved and granted to Capital Electric by the terms of the Public Utility Act itself; (3) that the court erred in holding that Capital Electric was barred of its right to operate within the disputed area after the annexation by the City for the reason that Capital Electric had not been granted a municipal franchise by the City; (4) that the court erred in its holding that the cease and desist order of the Commission issued on July 6, 1961, was erroneous in law and violative of the statutory rights of Mississippi Power & Light Company and the City of Clinton.

It is argued on behalf of the appellees in support of the judgment of the lower court that the statutes of Mississippi in unmistakable terms, have given to municipalities complete jurisdiction of streets and the absolute right to regulate by franchise the use which can be made of the streets by public utilities; that the power to determine what utilities may operate within and use the streets and public ways of a municipality is definitely vested in the

municipality by Sections 3374-119 and 3371-120, and Section 3374-73, Miss. Code of 1942, Rec.; and that only those acquiring and holding a franchise from the municipality itself can operate a utility therein. It is also argued on behalf of the appellees that it clearly appears from the language used in paragraph (g) of Section 5 of the Public Utility Act that it was the legislative intent that a utility should not be permitted to operate within a municipality without first obtaining a franchise from the municipality; that Capital Electric had not been granted a franchise by the City of Clinton, and for that reason the chancery court was eminently correct in its holding that Capital Electric should no longer be permitted to operate in the disputed area since the area had been annexed to and made a part of the City.

The questions of law presented for our decision on this appeal are substantially the same as the questions presented in Delta Electric Power Association v. Mississippi Power & Light Co., et al., Cause No. 42,535, decided by this Court on February 11, 1963. There is no substantial dispute as to the facts in this case, and on the questions of law the opinion rendered in the Delta Electric Power Association Case is controlling here. We think there was error in the court's holding that the cease and desist order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton. We also think that there was error in its holding that the extension of the corporate limits of the City of Clinton so as to include the disputed area within the City rendered ineffective as to that area the certificate of convenience and necessity granted to Capital Electric under authority of paragraph (b) of Section 5 of the Public Utility Act, and in its holding that Capital Electric was barred of its right to operate within the disputed area after its annexation to the City without first obtaining a franchise from the City.

As stated by the Court in the opinion rendered in the Delta Electric Power Association Case, prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of "grandfather" certificates under Section 5 are made on an area rather than a facility basis; and (2) a certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts. Capital Electric Power Association v. Mississippi Power & Light Co., 240 Miss. 139, 125 So.2d 739; Mississippi Power Co., et al v. East Mississippi Electric Power Association and Public Service Commission (Miss. 1962), 140 So.2d 286.

In Capital Electric Power Association v. Mississippi Power & Light Co., supra, which is generally referred to as the "Elton Case," the Court, in discussing the nature of the right acquired by Capital Electric by virtue of the certificate of convenience and necessity issued to it under paragraph (b) of Section 5 of the Public Utility Act, said: "Capital Electric Power Association is a corporation chartered and operated under Chapter 184, Laws of 1936, Section 5463 et seq., Code of 1942. It is obligated to render nondiscriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor. Capital Electric Power Ass'n. v. McGuffee, 226 Miss. 227, 83 So.2d 837, 84 So.2d 793, 56 A.L.R. 2d 403. Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable one. 'A non-exclusive franchise is a valuable right which can be protected in the courts.'"

In the Delta Electric Power Association case, the court had under consideration the effect of the annexation by the City of Winona of an area lying west of the City, which constituted a part of the service area certificated to Delta Electric by the Public Service Commission and which the Company claimed under a municipal franchise granted by the City many years prior to the annexation; and in its opinion in that case the Court said: "Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not consistent with the terms of the Act or with the legislative purposes."

What was said in the Delta Electric Power Association case is equally applicable to the facts in this case. The Public Utility Act, in our opinion, is not susceptible of the construction contended for by the appellees and adopted by the lower court, that, when the City of Clinton extended its corporate limits and annexed the disputed area the certificate of convenience and necessity granted to Capital Electric under paragraph (b) of Section 5 of the Act, in so far as it covered the disputed area, became ineffective. If the legislature had intended that awards by the Commission of service areas under the "grandfather" clause of Section 5 of the Act should be only tentative and subject to change in the event a portion of the certificated

area lying outside of a municipality on the effective date of the Act should be thereafter incorporated in a municipality, the legislature in our opinion would have expressly provided for such change and for payment of compensation to the utility whose rights were adversely affected.

As to the appellees' contention that paragraph (g) of Section 5 of the Public Utility Act indicates a legislative intent that a utility shall be required to obtain a franchise from the municipality before operating therein, we think that contention has been fully answered in the opinion rendered in the Delta Electric Power Association case. There is nothing in paragraph (g) of Section 5 to indicate that a utility which has obtained and is operating under a certificate of convenience and necessity issued by the Commission shall have its certificate revoked in whole or in part, or shall be required to apply for another certificate of convenience and necessity, if a part of its certificated area is later incorporated into a municipality.

It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, par. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case.

For the reasons stated above the judgment of the lower court, which reversed and set aside the order of the Public Service Commission, is reversed; and the order of the Public Service Commission is reinstated and affirmed.

REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "1-C"

No. 59,701

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI
MISSISSIPPI POWER & LIGHT COMPANY,
APPELLANT,

VS.

DELTA ELECTRIC POWER ASSOCIATION,
APPELLEE.

Opinion of the Court

Appellee, Delta Electric Power Association, holds a certificate of convenience and necessity in the disputed area. When this certificate was granted the area in dispute was not in the corporate limits of the City of Winona. The Appellant, Mississippi Power and Light Company, holds a certificate of convenience and necessity in the corporate limits of the City of Winona and other area not in dispute, and in addition thereto is a holder of a municipal franchise for the operation of its utility in said city.

The granting of a franchise to a public utility to operate in a municipality is governed by Section 3374-73 of the Mississippi Code of 1942, as recompiled and amended. Such a franchise and right can be given only by a majority of the qualified electors of a municipality voting thereon at a general or special election. There is also a limitation of twenty-five years as the effective date of such a franchise. It is the opinion of the Court that Chapter 372 of the Laws of Mississippi, 1956, does not repeal, change or modify Section 3374-73 or divest municipalities of this

jurisdiction and does not repeal or modify or change the jurisdiction of a municipality over the use of the streets and public places by a public utility.

The extension of the corporate boundaries of the City of Winona carried with it all the duties and responsibility of the City of Winona over the new area and also carried into the new area the franchise rights of the Mississippi Power and Light Company to operate its facilities therein. The Appellee, Delta Electric Power Association, was lawfully operating its facilities in the disputed area prior to this extension of the corporate boundaries but did not and does not have a municipal franchise as required by statute.

Therefore, it is the opinion of the Court that the Petition of the Appellee, Delta Electric Power Association, should be dismissed and the Cross Bill of the Appellant, Mississippi Power and Light Company, sustained.

Because the Appellee was lawfully operating in the disputed area on the date of the extension of said city limits, due compensation should be paid for the facilities existing as of the effective date of the Ordinance of the City of Winona extending its geographical limits or a reasonable time given for the removal of all of its facilities.

An Order may be entered herein consistent with this Opinion.

/s/ J. C. Stennett
Chancellor

APPENDIX "1-D"

Number 59,700

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, STATE OF MISSISSIPPI

MISSISSIPPI POWER & LIGHT COMPANY, CITY OF CLINTON, MISSISSIPPI, AND MISSISSIPPI MUNICIPAL ASSOCIATION, APPELLANTS,

VS.

CAPITAL ELECTRIC POWER ASSOCIATION, APPELLEE.

Memo Opinion

In construing our Mississippi Public Utilities Act, Chapter 372 of the Laws of 1956, Sections 7716-01, et seq., of the Mississippi Code of 1942, Recompiled, along with Sections 3374-129, 3374-119, and 3374-73 of the Mississippi Code of 1942, it is our humble judgment that when the City of Clinton expended its corporate limits and annexed adjoining area, which included the disputed area in this cause, that the Certificate of Convenience granted the appellee under the Act of 1956, supra, insofar as it covers the disputed area, became null and void and of no effect, and before the appellee can operate within the corporate limits of Clinton, it must secure a franchise from the City of Clinton.

We hold that the City of Clinton and its qualified electors have exclusive jurisdiction to decide who and what public utility or utilities may operate within the corporate limits of Clinton.

It is needless to say any and all actions taken in the premises by the City of Clinton are subject to review by any court of competent jurisdiction.

An order may be entered reversing and dismissing the petition and cross-petition filed with our Public Service Commission in this cause.

Respectfully yours,

Signed W. T. Horton
Chancellor.

APPENDIX "2"

Section 3375, *Mississippi Code of 1942*:

> "The corporate name of a city shall be 'The city of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which the place is commonly known); and by such name may sue and be sued and suits against any municipality shall be instituted in the county in which such municipality is situated where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

Section 3374-02, *Recompiled Mississippi Code of 1942*:

"The corporate name of a city shall be 'The City of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which such municipality has been legally designated); and by such name may sue and be sued, and suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

APPENDIX "3"

Section 3376, *Mississippi Code of 1942*:

"The limits and boundaries of the existing cities, towns and villages, shall remain as now established until altered, as herein provided: To enlarge or contract the boundaries of a city or town or village by adding thereto adjacent unincorporated territory, or excluding therefrom any part of the incorporated territory of such municipality, it shall be necessary for the municipal authorities to pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits and also defining the entire boundary as changed. Any two or more cities or towns situated and being adja-

cent or sufficiently near each other may combine into and become one municipality, in which event it shall be necessary for the municipal boards of mayor and aldermen of each of said municipalities so proposed to unite into one municipality to pass an ordinance at a regular meeting of said boards, declaring the intention of the said city or town to unite with such municipality, or municipalities, as it is proposed to combine into one municipality, defining with certainty the name of the municipality that shall be formed and the territory which it includes when so formed, and the entire boundary thereof, provided that the provisions of this section shall not apply to towns or villages with a population of less than three hundred, unless the territory which it is proposed to add to and include in the corporate limits of such towns or villages shall have been surveyed and platted into lots and blocks, and a map thereof duly recorded, and unless four-fifths of the property owners of said territory shall petition the municipal authorities of such towns or villages to add such territory to and include the same in the corporate limits of such towns or villages; and no cities or towns shall combine into one municipality where their present corporate limits are more than three miles apart."

Section 3374-10, *Recompiled Mississippi Code of 1942*:

"The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall in

general terms describe the proposed improvements to be made in the annexed territory and the manner and extent of such improvements and the approximate time within which such improvements are to be made, and such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement of the reasons for such contraction and a statement showing whereby the public convenience and necessity would be served thereby."

APPENDIX "4"

Section 7716-01, et seq., *Recompiled Mississippi Code of 1942*, the Public Utility Act of 1956, especially Sections 7716-05, 7716-06(b) and 7716-38:

"No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D(3) of section 1 (§7716-01), of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

"(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

"(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

"(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facili-

ties outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

"(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

"(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential

and commercial customers within said municipality, in case of a utility defined in section 1D(1) and 1D(2) (§7716-01) and in the case of a utility defined in 1D(3) (§7716-01) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

"(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder

of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

"(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 (this section) hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

"In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said mu-

nicipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

"In the case of a public utility as defined in section 1D(3) (§7716-01) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided."

Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

APPENDIX "5"

Section 88, *Mississippi Constitution of 1890*:

"The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

APPENDIX "5-A"

Section 2780, *Recompiled Mississippi Code of 1942*:

"All companies, associations of persons, municipalities, associations of municipalities, or natural gas districts, incorporated or organized for the purpose of building or constructing pipe lines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipe lines and appliances along or across highways, waters, railroads, canals, and public lands, above or below grounds, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands. The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and all such companies, associations of persons, municipalities, associations of municipalities or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof."

APPENDIX "6"

An Ordinance

Granting an Electric Franchise to Mississippi Power & Light Company, its Successors and Assigns, in the City of Winona, Mississippi, Fixing

the Terms Thereof, Prescribing the Obligations Thereasto, and for Other Purposes.

BE IT ORDAINED By the Mayor and Board of Aldermen of the City of Winona, Mississippi, lawfully assembled:

SECTION 1. In consideration of the benefits that will accrue to the municipality and the inhabitants thereof, Mississippi Power & Light Company, a corporation, (hereinafter called Grantee) is hereby vested with full right, authority, easements, privileges and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain, operate and conduct in said municipality a plant or plants and a system for the manufacture or distribution of electric current for all purposes whatsoever, for a term of twenty-five years from date of passage.

SECTION 2. The Grantee is hereby further given and vested with full right, authority, easements, privilege and franchise to construct, re-construct, erect, suspend, install, renew, maintain, operate and conduct in said municipality a system of poles, towers, conduits, cables, conductors, transformers, fittings, and all appliances and appurtenances now, or hereafter, during the life of this franchise, necessary or desirable to the transmission, distribution, and/or sale of electric current, for all purposes whatsoever, in, over, under, along, upon and across all streets, alleys, ways, bridges and public places and other municipal property in said municipality, as they now exist, or may hereafter be laid out or extended, together with the further full right, privilege, easement, authority and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain and operate said poles, towers, conduits, cables, conductors, transformers, fittings and all other appliances and appurtenances now or hereafter, during the life of this franchise, necessary or desir-

able for the transmission within, through and over and beyond said municipality, and to electricity consumers, both within and beyond the limits thereof, electricity for lighting, heating, power and all other purposes for which electricity may be now, or hereafter used, and for the purpose of extending its system beyond the limits of the municipality as they now may, or may hereafter exist.

SECTION 3. The poles, towers, conduits, cables, conductors, transformers, fittings, appliances and appurtenances, whether now in use or hereafter devised, shall be constructed so as not to unreasonably interfere with the proper use of the streets, avenues, alleys, ways, bridges, public places and grounds in said municipality, the municipality to approve location of same, and same shall be moved at expense of Grantee when necessary for paving, and shall be maintained in a reasonably safe condition and repair.

SECTION 4. Grantee may, from time to time, declare, make and enforce reasonable rules and regulations as a condition for the sale or distribution of electric current by it to the municipality, or any consumer therein or thereabouts during the life of franchise.

SECTION 5. In the event the supply of electric energy should be interrupted or fail by reason of accident, or otherwise, beyond the control of Grantee, the Grantee shall restore the service within a reasonable time, and such interruptions shall not constitute a breach of this franchise, nor shall the Grantee be liable for damage by reason of such interruptions or failure.

SECTION 6. Grantee will pay to the municipality a sum of money equal to two per cent (2%) of the receipts of the Grantee from the sale of electric service at retail for residential and commercial purposes (sales tax

excluded) within the corporate limits of the municipality as shown by Grantee's billing records, such payments to be due quarterly and the annual aggregate amount of such payments shall not be less than $100. Provided, however, the obligation to make said payment is conditional in that the full amount specified shall be paid during the term of this franchise unless and except should there be collected by the municipality from the Grantee any new taxes of any nature whatsoever imposed subsequent to the date of this franchise, or should there be an increase in the rates of any taxes now being collected by the municipality (except advalorem taxes now authorized by law), then the payment herein provided to be made by the Grantee to the municipality will be decreased by such amount.

SECTION 7. The Mayor and Clerk are authorized to execute, upon the part of the municipality, all requisite contracts with Grantee which have been approved by the Mayor and Board of Aldermen.

SECTION 8. The Clerk shall publish this ordinance according to the requirements of law, as soon as practicable after the passage hereof, and Grantee shall pay to said Clerk any and all costs and expenses of such publication.

SECTION 9. If any clause or section of this ordinance is illegal, or is not embraced within the title hereof, or is not cognate to the subject expressed in the title, the remaining provisions hereof shall not be thereby affected, but shall have full force and effect.

SECTION 10. This ordinance shall take effect from and after its passage; but Grantee shall not be bound hereby if within 30 days from and after this date it declines in writing to accept this grant. The foregoing ordi-

nance was reduced to writing and proposed and introduced by Alderman W. S. Gerard, and was read, considered and voted upon by sections and as a whole; the vote on each and all of the sections, and upon the ordinance as an entirety, was taken by "yea" and "nay" vote, those voting "yea" being as follows: Aldermen J. E. Allen, Kennedy Bryan, W. S. Gerard, E. A. Hammond, and James L. Shelton, and those voting "nay" being: Aldermen: None, ..., and was adopted on this the 23rd day of February, 1948.

/s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. A. Hammond
Clerk

SEAL

APPENDIX "7"

Street Lighting Agreement

Between

Municipality of Winona, Mississippi

and

MISSISSIPPI POWER & LIGHT COMPANY

THIS AGREEMENT made and entered into this the 23rd day of February, 1948, by and between the Municipality of Winona, Mississippi, a municipal corporation, hereinafter called "Municipality", and MISSISSIPPI POWER & LIGHT COMPANY, hereinafter called "Company"

WITNESSETH:

In consideration of the mutual covenants contained herein it is agreed as follows:

1. Company will furnish and Municipality will take and pay for its entire street lighting service during the term of this Agreement in accordance with Rate Schedule SL-4 &, SL-5 attached hereto and made a part hereof.

2. The service to be furnished as of the date of this Agreement consists of the following equipment:

A. Owned and Maintained by Company

(1) Overhead Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	49
2,500	52
4,000	
6,000	
10,000	

(b) Luminaires:

Radial wave reflectors or equivalent	101
Open suburban reflectors	
Small Pendant globe	
Center suspension units	5
Mast arms over 8 ft., no. of ft. over 8	

(c) Wood Poles 7

(d) Overhead Supply Lines, Circuit Ft. 43,400

(2) Whiteway Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	
2,500	
4,000	
6,000	
10,000	

(b) Luminaires

(c) Standards

(d) Supply Lines:
Overhead, circuit ft.
Underground, circuit ft.

B. Owned and maintained by Municipality except that Company shall furnish and replace lamps—

No. of Fixtures	Size of Lamp	No. Lamps per Fixture
19	2500 Lumens	One

3. Additional street lighting service other than as provided herein requiring the installation of additional facilities shall be by a supplementary agreement in writing and approved by an authorized official of the Municipality and an authorized official of the Company.

4. Payments are to be made by Municipality on or before the 10th day of each month for service rendered during the preceding month, and in case of failure to pay on or before that time, service may be discontinued by Company without terminating this contract, or waiving or impairing any of the right accruing to Company hereunder.

5. The Company shall use reasonable diligence to furnish continuous service hereunder but shall not be liable to the Municipality, or its inhabitants for failure to de-

liver service hereunder for causes reasonably beyond its control.

6. The term of this Agreement shall be for five years from and after the date hereof and shall be automatically extended for a period of five years from each expiration date of such time, or any automatic extension thereof, unless and until either party shall notify the other in writing not less than 180 days nor more than 360 days prior to any expiration date of its intention to terminate this Agreement.

7. This Agreement is subject to approval of Company's Vice-President.

Executed in triplicate original on the day and year first above mentioned.

MISSISSIPPI POWER & LIGHT COMPANY
By /s/ W. W. Williams

APPROVED:

/s/ R. B. Wilson
Vice-President

MUNICIPALITY OF Winona, MISSISSIPPI
By /s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. W. Hammond
Clerk

SEAL

APPENDIX "8"

(a) The contract was validly granted by the State of Mississippi under plenary authority therefor precedently vouchsafed to the State's agency

The authorization given by the State, whereunder this contract was made, provides, Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*):

> "* * * And such municipality may contract and be contracted with and exercise and perform all municipal powers and duties."

Such franchise had to be non-exclusive and this one was, for twenty-five years. The State on the 23rd day of February, 1948, prescribed the then boundaries of Winona as that wherein the franchise would be, but for the public welfare expressly provided by Section 3376, *Mississippi Code of 1942*, (now Section 3374-10, *Recompiled Mississippi Code of 1942*) that that which now was might be extended or contracted, compare *In the Matter of the Enlargement of the Municipal Boundaries of the City of Forest, Mississippi*, Miss. , 153 So.2d 688; and when the State thus did, our franchise but repeated that specifically binding. This question is not res nova, but rests upon statutes whose verbiage was validly adjudicated seventy-five years ago. *Henry* v. *Henderson*, 103 Miss. 48, 60 So. 33. As said by Mr. Justice Shiras in *Vicksburg Waterworks* v. *Vicksburg*, 185 U.S. 65, 69, 46 L. ed. 808, 811:

> "By an act of the legislature of the State of Mississippi, approved on the 18th day of March, 1886,

> the city of Vicksburg was authorized 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, *and to that end to contract with a party or parties who shall build and operate waterworks*'."

Pursuant to this power the Mayor and Board of Aldermen passed the ordinance quoted in 185 U.S. 65, 69, 76, 46 L. ed. 808, 811, 813:

> "'Sec. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, *and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction,* * * *'*
>
> * * *
>
> "'Sec. 13. The said Samuel R. Bullock & Company, their associates, successors, or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water, as they may determine; provided, that said rates and charges shall not exceed 50 cents for each 1,000 gallons of water.'"

In *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, applied and approved by this Court in *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, the power of the State, through Jackson, was thus declared by Mr. Justice Cooper, p. 643:

"In view of the nature and character of the subject-matter of the contract which the board of mayor and aldermen of the city of Jackson was authorized to make by the third section of the act of February 29, 1888, we think the contract entered into with the appellant was within the delegation of power, so far as the time of its duration is involved. The language of the act is 'that the board of mayor and aldermen be, and they are hereby, authorized and empowered to contract with any reliable corporation, association or individual, for supplying the said city of Jackson with water and electric or gas lights, from year to year, * * *.'"

See *Meridian Waterworks* v. *City of Meridian*, 85 Miss. 515, 37 So. 927.

Mississippi's Court had decided *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, in 1895, and had further decided *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167, in 1900, and in the *Trowbridge Case*, involving this specific "now or hereafter" clause, no attack was made in this aspect. To make assurance doubly sure, this Court then decided *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed 1102, whereunder the same "now or hereafter" provision was before the Court and not challenged. Then came *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, where the same franchise was involved with the "now or hereafter" clause incorporated, and this Court found naught therein objectionable for very possibly the then counsel thought it had been, as we respectfully submit it had been, ultimately determined that when the State, acting through the Legislature, had employed the municipality as a governmental instrumentality to contract without qualification, normal contracts, then usual and customary, when made, were inviolate. Note that said, 206 U.S. 515:

"In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years; and, in the absence of a showing of unreasonableness 'so gross', as the court of Mississippi has said, 'as to strongly suggest fraud or corruption' this action of the council is binding and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party.

"While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council, and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city."

This Court must construe the authority delegated. The State, beginning with the Vicksburg statute, gave its agency the power to contract within certain guide lines; but it made by legislative fiat the action of the municipality conclusive as to its boundaries, whether they remained stationary or were to be expanded. Furthermore, this Court recently in *Arizona* v. *California*, U.S. , 10 L. ed. 2d 542, when speaking of a similar grant of power, said, p. 566:

"* * * The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.* * *."

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 533, 48 L. ed. 1102, 1107:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

When the State saw fit, with qualifications not here relevant, to vest power to contract in the municipalities and pursuant thereto the municipality, acting for the State, did contract, the Contract Clause came into play. Compare *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155.

In *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204, Wisconsin assumed to transfer ordinance contracts into indeterminate certificates without the contractee's consent. This Court thereasto said, p. 137:

> "The integrity of contracts—matter of high public concern—is guaranteed against action like that here disclosed by §10, art. 1, of the Federal Constitution: 'No state shall . . . pass any . . . law impairing the obligation of contracts.' It was beyond the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract. Vicksburg v. Vicksburg Waterworks Co. 206 U.S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Detroit United R. Co. v. Michigan, 242 U.S. 238, 253, 61 L. ed. 268, 275, P.U.R. 1917B, 1010, 37 Sup. Ct. Rep. 87. The erroneous conclusion concerning this Federal question led to the decree below. * * *"

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 48 L. ed. 1102; *Detroit United R. Co.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

With the utmost deference to Mississippi's Court, they stress the fact that on March 29, 1956, there had not been made the addition of Area "B" to Winona as at now and, therefore, that in virtue of that action not having been taken, the Legislature, who gave the entire area, was privileged to split it as against the donee who was entitled to the unity so soon as the Mayor and Board of Aldermen had exercised the power vested under Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississipi Code of 1942*). That power has been exercised. That which the Mississippi Court assumes to do is to place the Act, as at March 29, 1956, in vacuo and to tear out of the contract that which the Legislature had specifically directed and the parties had agreed upon, that when additions were made that they would be within the municipal limits and that thereover Appellant would possess that contracted for. We start with "now" (the limits on February 23, 1948, Area "A"), and then the limits on the extension, November 3, 1959, Area "B"; and that which Mississippi's Court, with deference, has not dared to deny is that in good faith under existing decisions the contract of 1948 was made. We apply the maxim, "Qui facit per alium facit per se", *Broom's Legal Maxims*, p. 818. Thereunder the State must be just to Appellant before it can be generous to Appellee. Section 3376, *Mississippi Code of* 1942, and the express provision of the franchise provided that Area "B" should be irrevocably under the contract upon November 3, 1959. The State could not legislate herself from this obligation effective until February 22, 1973. If it were possible for the State then to give that which it initially had the power to give, the Appellant has those

rights which we have asserted. Suppose the franchise had specifically provided that instead of "hereafter", "on November 3, 1959, and on and after this date", the State had conferred on Area "B" of the City that requisite to make of the city a unity and to prevent second class citizens therein. Compare *Gomillion* v. *Lightfoot*, 362 U.S. 339, 5 L. ed. 2nd 110, citing *Mobile* v. *Watson*, 116 U.S. 289, 29 L. ed. 620, and *Graham* v. *Folsom*, 200 U.S. 248, 50 L. ed. 464.

Thus the State having authorized Winona as at the 23rd day of February, 1948, to grant a franchise throughout the city as it then was and Appellant having contracted under the future planning now essential thus to do, the Legislature having given by contract the entire city, may not sever the contract in Area "B" and donate to the Appellees. Appellant is perfectly willing for Appellee to have that which the State could lawfully donate after Appellant's rights hereinabove quoted specifically were conserved.

Admitting possible error, then arguendo:

(b) The Act, instead of taking away Appellant's rights, confirms them, in this, that Section 7716-05(b), alleged to have emasculated, is but a general provision and there is therein the last provision, Section 7716-38.

Admitting, as we most surely do not, that this Court and the Mississippi Court will determine contra to that said in (a), then surely let it be noted that Section 7716-05(b), whereunder the Commission and Mississippi's Court ousted Appellant from its constitutional rights and condemned it to desist from profitable operation in Area "B", is but a part of the Act and that the last section in the Act specifically thus provides, Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither

the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

In *United States* v. *Heinszen*, 206 U.S. 370, 382, 51 L. ed. 1098, 1102, this Court said:

"That where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary. * * *

"* * * * * * If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and (the power) to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the Maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.* Under the Constitution Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.'"

Quoting from *Mattingly* v. *District of Columbia*, 97 U.S. 687, 24 L. ed. 1098, 1099. See also *Vaughan* v. *Swayzie*, 56 Miss. 704. Appellant must have a dominant franchise throughout the municipality.

In this cause the Appellees were sole complainants and the State was not a party, as such, in either cause, nor subject to suit. Winona was never a party so that the decrees herein are as between the Appellees, Associations, and Appellant, the Power Company, res judicata; but as between the Appellant, the State and Winona res inter alios acta; and as to the State a nullity. *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 78 L. ed. 894; *Hansberry* v. *Lee*, 311 U.S. 32, 85 L. ed. 22.

This Court in *Arizona* v. *California*, ___ U.S. ___, 10 L. ed. 2d 542 had in mind certain appropriations that were beyond the apportioning power of the Secretary of the Interior, and therein quoted as apposite the statute. Footnote 87, p. 569:

> "87. 'Nothing . . . in (this Act) shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing . . . (herein) shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.' 43 USC §383 (1958)."

Compare *Head* v. *Board of Examiners*, ___ U.S. ___, 10 L. ed. 2d 983, Opinion Mr. Justice Brennan, p. 990, 996.

Note the Act contains the provision as to the certificate of convenience and necessity, Section 7716-05(b), and at

the same time, passed as a unit, it contains Section 7716-38. These two sections, inseparably integrated, must be judicially determined, *Coker* v. *Wilkinson*, 142 Miss. 1, 106 So. 886, and if absolutely irreconcilable, the Court said, p. 887:

> "* * * and that the latter clause being in conflict with the former and being the last expression of the Legislature on the subject, must stand and the former go down under the principle of law that, where there are two conflicting provisions in the same statute, the last expression of the Legislature must prevail over the former. Undoubtedly that principle of statutory construction is sound. * * *."

Craig v. *Walker*, 191 Miss. 424, 2 So. 2nd 806; 50 *Am. Jur.*, "Statutes", Section 365, p. 370; *Inglehart* v. *Inglehart*, 204 U.S. 478, 51 L. ed. 575; and supplementally, this Court said in *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208, 76 L. ed. 704, 708:

> "* * * General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. United States v. Chase, 135 U.S. 255, 260, 34 L. ed. 117, 119, 10 S. Ct. 756, 8 Am. Crim. Rep. 649. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * *. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. * * *."

Approved in *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 6 L. ed. 2d 72, 76.

Basically under the prior decisions here and in Mississippi, Appellant had contractual rights. When in 1956, this legislation was before the Legislature, the utilities were not either dead or dumb. They realized what was

upon them and that they must protect themselves as to their franchise under the Contract Clause; and that they so thus did, those here signing can as of knowledge state, and the terms of the Act so show. This protection is found in Section 7716-38. This Act recognizes that there may be utilities within the same municipality, but this section is a specific section, which, under settled law, constitutes an exception to the prior general provisions and as such makes this section the crux of this case:

> (1) "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, * * *."

But under the decisions of this Court and the Supreme Court of Mississippi, there was thereasto a contract, unimpairable, and when repeal by the State is attempted of a provision of a contract, so that there will be an impairment, that done by the State is a nullity. *Louisiana* v. *Pilsbury,* 105 U.S. 278, 301, 26 L. ed. 1090, 1098, wherein it is said:

> "The case of Von Hoffman v. Quincy, reported in 4th Wallace, 535 (71 U.S., XVIII., 403), is a leading one on this subject. The court there said: 'That when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound.'"

It is true, however, that Mississippi's Court did say, *Delta Electric Power Association* v. *Mississippi Power & Light Company,* Miss. , 149 So.2d 504, 513:

> "All of these statutes must be read together, and in the light of subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is in-

consistent with any of the former's provisions, *the Act modifies them.* * * *."

With deference, we defend our Court against the accusation that it was there assuming to act in contravention of the Contract Clause. It knew better and has revered that Clause. *Yazoo & M.V. R. Co.* v. *Adams*, 90 Miss. 559, 45 So. 91; *Wisconsin Lbr. C* v. *State*, 97 Miss. 571, 54 So. 247. And if this so be, then potentially reversal must be had with a remand to Mississippi's Court to delimit the State's interpretation of this statute, *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555, 4 L. ed. 2d 1397, so that if essential this Court may see clearly to pluck out the mote.

(2) "* * * but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, * * *."

It is perfectly obvious that these utilities in Mississippi with their monies invested, were vitally interested in the passage of this Act, and, with deference, saw no impairment therein or thereby under the nonexclusive contract of electric service within the municipality as it from time to time might be changed as to boundaries under the reserved power in *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; and *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110. Note that the Legislature diligently considered the matter as Mississippi's Court said and when they so did used in this section "repeal" and "passage", so as that there would be no possible contention, with deference, such as Mississippi's Court has assumed to raise up.

The first provision says that "neither the repeal of any such acts * * * shall affect any act done, or any cause

of action, whether in litigation or otherwise". Appellant was thoroughly conversant with that which began with Vicksburg and continued down until the passage of this Act and it will not be challenged by anyone that had it been dreamed that the effect of this Act was to impair the obligation of every franchise, every all-requirements contract, in every municipality in the State, there would have been the most violent protest at unsettling by impairment the basic conceptions that had persisted for nearly three-quarters of a century. The Court will see that the Legislature, notwithstanding the repeal of any act in conflict, then went further and stated that such repeal should not "affect any act done, or cause of action, whether in litigation or otherwise". This is extraordinary, but more extraordinary is the further declaration, "or any rights accruing, accrued or established prior to the effective date of this act". In *Arizona* v. *California*, U.S. , 10 L. ed. 2d 542, 553, this Court said:

> "* * * Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short-hand expression of this legal principle * * *."

"Qui prior est tempore, potior est jure", *Broom's Legal Maxims*, p. 362; 51 *C.J.* 297. Thus with the valid acceptance and erection of the facilities the State lost its potency to impair.

Note the further declaration "nor the passage of this act shall affect any act done or any cause of action, whether in litigation or otherwise". The pronoun "this" is all-inclusive and embraces every provision of the Act from its title to its approval. With deference, this language falls squarely within the reasoning of Mr. Jus-

tice Black in *United States* v. *Braverman*, ... U.S. ....., 10 L. ed. 2d 444; and any impairment of that specifically granted to the Appellant was as effectually condemned as was the rebate under the Interstate Commerce Act. It is essential, with deference, when the Legislature thus speaks, that the courts vouchsafe protection to those who have acted upon grants made by the State through the same appropriate words, as have been respected from time out of mind.

(3) Note, finally, Section 7716-38:

> "* * * or any rights accruing, accrued or established prior to the effective date of this act."

In 30 *C.J.S.* 1232, "Established" is thus defined:

> "* * * made definitely certain, settled unalterably, or made final beyond question or dispute in so far as any question can be settled in a court proceeding; purchased."

Wells Lamont Corporation v. *Bowles*, Em. App., 149 F.2d 364, 366, certiorari denied, 326 U.S. 730, 90 L. ed. 434; *District of Columbia* v. *Fleming*, C.A., D.C., 217 F.2d 18; *Walling* v. *Fred Wolferman, Inc.*, D.C. Mo., 54 F. Supp. 917.

Note further the words "any rights accruing, accrued". *United States* v. *Lindsay*, 346 U.S. 568, 98 L. ed. 300, 304. As at the date of the passage of the Act, all of the rights under this franchise to that moment are conceded to have existed, and but for the Act could have been enjoyed. Now, with this fixation of these rights accrued to the moment of the passage of this Act, the Legislature went further and used the participle "accruing"—rights accruing. Unquestionably, the contract franchise "hereafter" falls definitely within that term. *Spring City F. Co.* v. *Commissioner of Internal Revenue*, 292 U.S. 182, 78 L. ed. 1200, 1203; see, especially, *H. Liebes & Co.* v. *Com-*

missioner of Internal Revenue, C.A. 9, 90 F.2d 932, reviewing cases. See also *Grenada Bank* v. *Petty*, 174 Miss. 415, 164 So. 316; *United States* v. *St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 70 L. ed. 435; *Fullerton-Krueger Lbr. Co.* v. *Northern Pac. R. Co.*, 266 U.S. 435, 69 L. ed. 367; *United States* v. *Munro-Van Helms Co.*, C.A. 5, 243 F.2d 10, 12; 1 *C.J.S.*, "Accrue", p. 759.

Hereasto, that submitted certainly demands the exercise of the exclusive jurisdiction, especially because there being a contract, the State Legislature, under the holding of the Court, here divided the contract into two parts, leaving Appellant to be bound by and perform qua Area "A" and divested even a pretense of a right in Area "B"; and thereasto, substantially, with deference, so adjudged as that if Appellant passed over Appellee's Area "B" to perfect its electric connections, there would be a law violation. That demanded is as large a charter as the winds require within Winona until February 22, 1973; but arguendo that the Court should hold that naught has been said of sufficient moment to require a hearing on the merits and to that extent we stand defeated, yet like the village schoolmaster, we can argue still, and, with deference, accurately.

(c) An appropriate construction of Section 7716-05(b) is to be had whereby serious constitutional questions may be avoided, *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; and Section 7716-05(b), on its face, related exclusively to the future with Appellant's franchise dominant.

Section 7716-05 and Section 7716-05(b) of the Act definitely and expressly provide:

"No person shall construct, acquire, extend or operate equipment for * * * generating, transmitting or

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distributing * * * electricity, * * *, for any intrastate sale to or for the public for compensation, * * * without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

* * *

"(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or *operation then being conducted*, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; * * *."

Basically, these two sections must be construed by this Court so far as the Contract Clause is alleged to be impaired. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102. In construing the franchise possessed by Appellant hereinabove quoted in full, this Court must so construe this section of this Act, forgetting for the moment Section 7716-38, so as to make Appellant's the dominant franchise and Appellee's rights servient thereto. The admeasurement of these rights need not be herein made not being at issue. Confessedly the cases of *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771; *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167; and *Griffith* v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011, had been determined by the Supreme Court of Mississippi, and each of them had approved the grant made by the municipal boards under the authority of the State. *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155. Insofar as this Court went it assumed to regulate rates throughout the area under Sec-

tion 13 of the ordinance, both as it was when the grant was made and potentially after Vicksburg was in process of expanding. Appellant's system at Winona was owned and operated and the right thus to do was vouchsafed constitutionally until 1973. Appellant's contract to that extent has not been questioned by the State, qua State, or by Winona, and Appellee has no justiciable rights as to the areas not certificated to it. Grants by the State to Appellee, as well as to all other persons, are to be strictly construed in favor of the grantor. In *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 469, 50 L. ed. 1102, 1111, this Court said:

> "In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of this contract, it cannot be held to have done so by mere implication. * * *."

Citing *Knoxville Water Co.* v. *Knoxville*, 200 U.S. 22, 50 L. ed. 353.

As to the power of the Legislature to superimpose upon Appellant and its franchise rights a provision for an indeterminate future franchise, this Court has specifically made denial. *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204. The right of the State to amend Appellant's contract had to be specifically reserved. *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389. As to the franchise being at all

times co-extensive with the municipal boundaries, the law itself thus did under Section 3374-10; and, with the utmost deference, the Supreme Court of Mississippi completely missed the road laid down by this Court and all other Courts that when the boundaries of a municipality are extended or contracted and provision so made as that the State may legislate, all obligations are contemporaneously citywide, especially when so made as is herein done by explicit provision. Section 3374-10. Compare 37 *Am. Jur.*, "Municipal Corporation", Section 34, p. 651; 62 *C.J.S.*, "Municipal Corporations", Section 78, p. 186; *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 5, Sec. 1530, p. 129; *Pond on Public Utilities*, 4th Ed., Sec. 131, p. 316, *et seq.*

These authorities recognize, with deference (a) "Modus et conventio vincunt legem", Broom's Legal Maxims, p. 689, and that the Contract Clause exists and (b) that in the statutes "municipality" is synonymous with and must be read to include, unless prohibited, expansions and contractions. Such expansions or contractions are operative (a) eo instanti when made and (b) proprio vigore under the statutes. In certain decisions, this is exemplified thus, 13 *Am. & Eng. Anno. Cases* 137:

> "A municipality has power to contract by ordinance that a franchise granted shall be in force in the corporate limits of the city as they exist at the time of the passage of the ordinance or as they may thereafter be enlarged, for, if the ordinance were silent as to the territory thereafter taken into the city, the meaning would be the same. Truesdale v. Newport (Ky.) 90 S.W. 589."

So our respectful submission is that this Court must for itself determine whether the offer to contract with the State through its municipality, when accepted, became a contract binding the State as well as the municipality up

to the boundaries as they exist from day to day. That the State acted through the municipality in no wise diminished the obligatory effect of the contract. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341. Under *Yazoo City* v. *Lightcap*, 82 Miss. 148, 33 So. 949, Mississippi's Court recognized the propriety of allowing each municipality to contract so as to best promote its particular welfare—especially the future planning. Naught reasonably and appropriately granted to Appellee may be so construed as to oust Appellant from an area which, under settled law for three-quarters of a century, has been validly subject to legislation through the municipal agency when, as here, appositely delegated and appropriately ratified, to say nothing of the impropriety of Mississippi's Court taking Area "B" of the municipality and giving it gratuitously, and possibly contrary to Section 95, *Mississippi Constitution*, to Appellee. Thereasto in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 702, 4 L ed. 629, 675, Mr. Justice Story declared:

> "* * * This question cannot be answered in the affirmative until it is established, that the legislature may lawfully take the property of A and give it to B; * * *."

This litigation was most violent and involved many other issues, one of which took away from the municipalities the rich revenues potentially realizable through sale of the franchise.

Our submission is that under this jurisdictional statement, the basic contract provisions quoted hereinabove are valid as granted, but if perchance not so, then ratified specifically; and again, if perchance not so, then per se did not authorize the Commission to take from Appellant that which was its own and vest it in another gratuitously.

When these cases shall have been assigned to the docket, the foregoing segment will be incorporated in Appellant's brief and these decisions as to these provisions with deference, demonstrate mathematically that the Constitution has been turned into chaos.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 403

MISSISSIPPI POWER & LIGHT COMPANY ET AL.,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTION TO DISMISS APPEAL

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the following ground:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

I. OPINIONS OF THE SUPREME COURT OF MISSISSIPPI

The case has not been officially reported, but is unofficially reported: *Capital Electric Power Association* v. *Mississippi Power & Light Company et al.*, 150 So.2d 534. Copy of the opinion appears as Appendix 1 hereto.

The opinion made frequent reference to parts of the opinion in another case of similar import (not officially reported, but unofficially reported: *Delta Electric Power Association* v. *Mississippi Power & Light Company et al.*, 149 So.2d 504) decided by the same court a short time before. A copy of the opinion in that case appears as Appendix 2 hereto.

II. STATEMENT OF THE CASE

1. Preliminary Statement

This case reached this Court by these steps: (1) Appellee, an electric utility, filed a petition for a cease and desist order against Appellant, another electric public utility, before the Mississippi Public Service Commission (Commission) alleging an unlawful invasion of Appellee's certificated service area by Appellant; (2) the Commission, after hearing, granted the cease and desist order; (3) Appellant appealed to the Chancery Court of the First Judicial District of Hinds County, Mississippi (Chancery Court), the intermediate court of appeals, and that court reversed the Commission's order holding that Appellant, not Appellee, was entitled to serve the area involved in the litigation (disputed area); (4) Appellee appealed to the Supreme Court of Mississippi (Mississippi Court) and that court reversed the Chancery Court

and reinstated and affirmed the cease and desist order of the Commission; and (5) Appellant appealed to this Court on alleged constitutional questions.

2. The Act

Prior to enactment of the Public Utilities Act of March 29, 1956 (Chapter 372, *Mississippi Laws of 1956*; Section 7716-01, *et seq.*, Vol. 6 Recompiled, *Mississippi Code of 1942*), herein called the "Act", electric public utilities were not regulated by the Commission or any other state agency on a statewide basis. That Act brought them under the exclusive original jurisdiction of the Commission for regulation in respect of all of their "intrastate business and property", subject to certain exceptions not material here (Section 7716-04, Vol. 6 Recompiled, *Mississippi Code of 1942*).

The Act recognized prior service rights and granted unto each electric utility upon timely application being made, and without proof that the public convenience and necessity would be served thereby, the right to a certificate of public convenience and necessity (usually called a "grandfather certificate") to continue serving the areas being served by it on and prior to the effective date of the Act. These certificates were provided for on an area basis, not a facility basis

Copies of Sections 1, 4, 5, 6, 22, 26 and 28 of the Act (Sections 7716-01, 7716-04, 7716-05, 7716-06, 7716-22, 7716-26 and 7716-28, Vol. 6 Recompiled, *Mississippi Code of 1942*) constitute Appendix 3 hereto.

3. Legal Status of Parties

Appellant and Appellee were each and both included in the definition of a "public utility" contained in the Act and each and both were made subject to the terms and

provisions of the Act and the jurisdiction of the Commission (Section 7716-01 and 7716-04, Vol. 6 Recompiled, *Mississippi Code of 1942*).

The parties may be further identified as follows:

1. Appellee is a Mississippi corporation organized and operating under and by virtue of Chapter 184, *Mississippi Laws of 1936*, as amended (Section 5463 *et seq.*, Vol. 4A Recompiled, *Mississippi Code of 1942*) and by the terms and provisions of said Act and its charter is vested with full, plenary and unrestricted authority to render electric service of every kind and character, residential, commercial, industrial and other, both within and without municipal and urban areas of all sizes.

2. Appellant is a foreign corporation organized and operating under the laws of the State of Florida but doing business in Mississippi in an area located generally in the western half of the state. While its charter is not in the record, nor has its authority under the laws of Florida been established in the record, it may be assumed for present purposes that its statutory and charter authority is substantially if not entirely as broad as that of Appellee.

This identification is given in view of Appellant's attempt before all tribunals, including this Court, to imply that there is some sort of difference (favorable to Appellant) in the legal status, rights and public responsibilities of the two utilities. Such is not the case.

4. The Record

By permission of the Mississippi Court, the original record in that court has been certified and sent up to this Court as the record on this appeal. The record is in twelve volumes. Volume I to XI, inclusive, consisting of 2073

pages, constitutes the record made before the Commission and by it certified to the Chancery Court as the record on appeal to that court; and by that court sent up to the Supreme Court of Mississippi as a part of the record on appeal to that court. Volume XII, consisting of 105 pages, is the record made in the Chancery Court which contains no evidence, the case having been tried in that court on the record made before the Commission.

For convenience, the record made before the Commission will be referred to herein in the usual way by the letter "R" followed by a page number, thus "R ....."; while the record made in the Chancery Court and wholly contained in Volume XII will be referred to by the abbreviation "Ch. R" with page number cited, thus "Ch. R ....".

NOTE: Inasmuch as the original record of the Mississippi Court is now on file in this Court (and was so filed before Appellee received a copy of the Jurisdictional Statement) and is not available to Appellee, it will be impossible for Appellee when referring to an exhibit herein to give "the page number at which the exhibit appears and at which it was offered in evidence" as required by Rule 40-2 of this Court; but in all other respects citations to the record will be in accordance with said Rule.

5. The Facts

Beginning in 1939, Appellee built lines in the disputed area (a rural area) and held itself out to the public as offering its services to all who wished them; actually served all persons desiring service and applying therefor; and it has continued to do so until this day (R 768, 769). The earliest actual service was July 24, 1944. Others were added in the 1940's and 1950's as need

arose. Lines were added as needed. Appellee now has fourteen services in the area, including residential, church and commercial (R 1231; Exh. 63).

Neither Appellant nor any other electric utility has ever served the disputed area or any part thereof (except for the two residential services on the extreme northern edge connected by Appellant for two of its employees before the Act was passed and which were "frozen" by agreement of the parties and the Commission's order of September 21, 1959, in Docket No. U-84, Appellee's "grandfather application", this being the method adopted by the Commission and applied in all cases to deal with one or more "stray" services of a utility located within the "grandfather service area" of another utility, the predominate server of the area) (R 768, 769).

During the period 1956-1959, at the suggestion of the Commission, the two utilities set about to "identify" as best they could service areas to which they would be entitled, respectively, under their established rights, including rights under Section 5(b) of the Act, the so-called "grandfather clause". They were able to reach full agreement in this respect, whereupon they made maps (by counties) identifying such areas, initialed the maps and filed them with the Commission. The pertinent map here was Hinds County (R 903-927; Exh. 17). That map identified the disputed area as an area to which Appellee had grandfather rights, and both utilities recommended that the area be certificated to Appellee along with its other service areas in seven counties of the State (R 908; Exh. 17).

Thus the two utilities were in full accord that the disputed area was in law and in fact "grandfather service area" of Appellee and should be certificated to it as such.

The disputed area had been claimed by Appellee as grandfather service area in its application, Docket No. U-84. At first Appellant filed a sort of generalized protest to Appellee's application in U-84 (no particular or specific objection with respect to the disputed area), but that protest was later withdrawn and the disputed area was certificated to Appellee without objection under the Commission's order dated September 21, 1959 (R 803; Exh. 11).

Appellant obtained a "grandfather certificate" under its application to the Commission, Docket No. U-44, issued November 19, 1959, in which its certificated service area was described by metes and bounds. It did not include any part of the disputed area.

March 25, 1960, the disputed area (with other areas) was annexed to the municipality of Clinton by expansion of the corporate limits of that city.

On May 16, 1960, Appellant built its distribution line into and through the disputed area along the principal street thereof a distance of 1775 feet. The line was built immediately across the street from Appellee's line then in service and duplicated Appellee's line all the way (R 929, 1231; Exh 63). Along this line Appellant installed five street lights, four of which were located directly across the street from street lights of Appellee which were then and are now in service (R 1231; Exh. 63; R 1235); and connected permanent service to the residence of C. M. Kelley where Appellee's service was already being rendered for construction purposes; and Appellant solicited other services in the area (R 929 and 1523).

Appellant did not obtain a certificate of public convenience and necessity from the Commission for such construction or services, nor did it obtain the permission of Appellee.

The asserted basis for the invasion of Appellant was that it had a franchise and a street lighting contract from the City of Clinton, both obtained in 1946 for a period of twenty-five years, and by their terms they extended to areas subsequently annexed to the municipality.

Appellee's facilities in the disputed area are in excellent condition and its service therein is and has always been excellent (R 755 and 769; Exh. 63; R 1231). Appellee is ready, able and anxious to serve all of the needs of the disputed area now and in the future (R 969).

Appellee's physical facilities in the disputed area are reasonably worth $5,801.00, not including "back-up facilities" (R 786; Exh. 10).

Appellee's revenue from the disputed area for the twelve month period October 1, 1959 to September 30, 1960 (the most recent twelve month period preceding preparation of data for the hearing before the Commission) was $2,461.25. It was estimated by Appellee's manager, from twenty years of experience as such manager, and an equal period of time of closely observing the development of this and other areas in the vicinity, that the annual revenue by 1965 would be approximately $10,000.00 (R 771; Exh. 9).

III. ARGUMENT

A. There Has Been No Impairment of the Obligations of a Contract

The Mississippi Court held that the rights granted unto Appellee by the State under the terms of the Act, as implemented by the certificate of public convenience and necessity issued to Appellee by the Commission, were not annulled or impaired in any way by annexation of

the disputed area to the City of Clinton; and that Appellee continued to have the right to serve said area under its certificate of public convenience and necessity under and subject to the terms of the Act and the jurisdiction of the Commission (although of course the municipality would have the right to regulate reasonably the manner in which Appellee's lines and appliances are constructed and maintained, subject to the original primary jurisdiction of the Commission over all services and facilities of public utilities under the Act).

It is apparent that the Act as so interpreted and applied does not constitute an impairment of the obligations of the contracts between Appellant and the City of Clinton (franchise for use of the streets and other public places and street lighting agreement) because:

1. Municipalities in Mississippi have no powers except those granted to them by legislative enactment under the police power. Unlike certain other states, municipalities are not granted any powers whatsoever under the Constitution.

2. The authority to grant franchises and provide for street lighting granted by the State to municipalities was limited to areas *within the municipal boundaries.* Thus the franchise granted by the City of Clinton to Appellant in 1946 and the street lighting agreement of the same year did not become effective as to the disputed area, if at all, until March 25, 1960, the date the disputed area was annexed to the municipality.

3. Meantime, March 29, 1956—four years earlier—the State in the exercise of its police power had, through legislative enactment, granted unto Appellee the right to a certificate of public convenience and necessity to provide all needed electric service to the disputed area, and

this right was implemented by actual issuance of the certificate of public convenience and necessity by the Commission on September 21, 1959, still a full year and a half before annexation of the area, but actually effective as of the date of the Act, March 29, 1956. In *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So.2d 739 (Mississippi, January 9, 1961), the Mississippi Court characterized such a certificate of public convenience and necessity as being ". . . in truth and in fact a franchise from the state."

4. The subsequent annexation by the municipality and a franchise and street lighting contract given by it, all effective (if at all) for the first time March 25, 1960, could not annul the prior legislative enactment and the certificate or franchise issued to Appellee pursuant thereto.

5. Therefore, viewed in the light most favorable to Appellant, and assuming *arguendo* that the contracts with the City of Clinton became effective March 25, 1960, it is apparent that on that date the City of Clinton had no power to grant the rights it attempted to grant for the State (Clinton's creator and sovereign) had already granted those rights to Appellee. Thus Appellant never acquired any rights under its contracts with Clinton insofar as the disputed area is concerned, and there were none to impair.

6. The Mississippi Court dealt effectively with this question in its opinion (150 So.2d at page 534) as follows:

> "It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal consti-

tutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, cl. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case."

In the *Delta* case the franchise and street lighting agreement were obtained from the City of Winona in 1948, and the disputed area was annexed to that city in 1959.

Turning then to the opinion in the *Delta* case, we find the point disposed of in an unanswerable way in the following passages (149 So.2d at pages 513, 514):

"A municipality in Mississippi is a creature of the state. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant utility franchises and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs. 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands subject to regulation.

"All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So.2d 85, 844 (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to Company, did not supersede Delta's cer-

tificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power over areas then outside of municipalities, nor its power to control and regulate municipal activities.

"Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

"A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. Southern Bell Telephone & Telegraph Co. v. City of Meridian, 241 Miss. 678, 131 So.2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

"Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate lim-

its, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

"On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26(d) (scope of review)."

B. This Court Will Accept the Mississippi Court's Interpretation of Mississippi Statutes

This Court accepts the interpretation by a state court of last resort as to the meaning of state statutes. The Mississippi Court has clearly held that under Mississippi statutes a municipality of the state has authority to grant franchises and make street lighting contracts only in respect of area within the municipality; that its ordinances have no extraterritorial effect.

Applying this rule, the Mississippi Court has held that under the state statutes authorizing the City of Clinton

to grant the franchise to Appellant and enter into the street lighting agreement with Appellant (Appendices 6 and 7 to Jurisdictional Statement), notwithstanding the provisions in each making it applicable to annexed areas, that franchise and that agreement were wholly ineffective as to the disputed area which lay outside the municipality. This was because of a simple lack of statutory authority on the part of the municipality. That court further held, as is obvious, that if as between the parties, the city and the Appellant, the contract should be considered as becoming effective on March 25, 1960, the date the disputed area was annexed to the municipality, it nevertheless would avail nothing for Appellant because four years earlier, March 29, 1956, the state (the city's creator and sovereign) had granted unto Appellee the exclusive service rights in the disputed area (subject to being divested of those rights by order of the Commission under certain circumstances not present here) and thereby removed the subject matter from the jurisdiction of the municipality before the municipality had authority to deal with it.

To repeat brief excerpts from the opinion of the Mississippi Court in the *Delta* case (149 So.2d at page 513), which passages were adopted on this point in the opinion in the case at bar (150 So.2d at page 542):

> "A municipality in Mississippi is a creature of the state. It has only such power and authority as may be granted to it by statute. . . .
>
> "Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. . . .
>
> ". . . When they (the franchise and street lighting contract) were executed by the city, no statute of this state authorized Winona to grant a franchise

or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant company any rights in the disputed area when the contracts were executed.

". . . The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area."

This Court will not gainsay the Mississippi Court as to the meaning of state statutes delineating the authority granted by the state to its municipalities. It will accept those statutes as meaning precisely what the state court of last resort has construed them to mean. *A fortiori*, where the state court of last resort has determined that there is no state statute granting extraterritorial power to municipalities—and Appellant cites none—this Court will accept that determination.

In 3 *Cyclopedia of Federal Procedure*, 3rd Ed., Section 6.14, pages 183-186, it is said:

"State decisions establishing state law constitute the rule of decision where they are applicable to matters in civil actions in the federal courts and where the Federal Constitution, federal statutes, treaties or state statutes are not applicable thereto, Swift v. Tyson in this respect being overruled by the Erie case. Of course, the highest state authority is the final authority on state law . . .

"State decisions construing state statutes and municipal ordinances are to be followed as the rule of decision in federal courts. The same rule applies to the construction of state constitutions, and it also applies to the interpretation of state administrative orders under authority of state statutes."

In *Albertson* v. *Millard*, 345 U.S. 242, 73 S. Ct. 600, 97 L. ed. 983 (1953), there was an appeal by plaintiffs from a judgment of the United States District Court for the Eastern District of Michigan holding that the Michigan Communist Control Bill was constitutional. This court held:

> "The construction given to a state statute by the state courts is binding upon the federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.
>
> "There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state grounds. That action is being held in abeyance pending our mandate and decision in this case.
>
> "We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action. (Citing cases)
>
> "The judgment is vacated and the cause remanded to the District Court. . . ."

In *United States* v. *Burnison*, 339 U.S. 87, 70 S. Ct. 503, 94 L. ed. 675 (1950), two appeals were combined for decision and they involved the power of the California Supreme Court to declare invalid testamentary dispositions to the United States by two California residents. This court said:

> "The California Court construed Section 27 of the California Probate Code to prevent a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations. The court arrived at this interpretation despite the contention of the United States that it

would raise serious constitutional questions. The construction of the California Code by the California Supreme Court is, of course, binding on us. It leaves us, however, with the federal constitutional questions that the United States urged the California Court to avoid."

It is, therefore, submitted that Appellant had no franchise or street lighting agreement affecting the disputed area as of the date the Act was adopted, March 29, 1956, and it follows that there could have been no impairment.

C. Even If Appellant's Franchise and Street Lighting Agreement Had Been Effective As to the Disputed Area on the Effective Date of the Act, the Act Would Still Be Valid

It is clear that the franchise and street lighting contract were absolute nullities as to the disputed area as of the date the Act granted the exclusive service rights of the area to Appellee, March 29, 1956, but even if they had been effective as to the disputed area on that date the Act would have been a valid exercise of the police power of the state.

Not every impairment of the obligations of contracts is proscribed by the contract clause of the Federal Constitution. If the impairment results from a legislative enactment adopted in the reasonable exercise of the police power of the state for the protection and welfare of all of its citizens, the enactment is valid notwithstanding the impairment.

Both the preamble and the text of the Act reveal legislative determination that it was urgent that a statewide system of regulation of certain public utilities be

established, including among other things rates, services and *service area allocations*, in order to protect and promote the public interest and welfare. The preamble read as follows:

> "WHEREAS, the services of certain public utilities have been extended to large areas of the state, both within and outside of municipalities, and it is in the public interest that the Public Service Commission of the State of Mississippi be vested with authority to regulate such utilities' rates and services, so as to assure reasonably adequate services to the inhabitants of this state at rates which will be fair and reasonable to the consumer, and provide a fair return to said utilities, both of which objectives are necessary to the general welfare of this state; Now, Therefore, . . ."

The text of the Act included provisions for allocation and certification of service areas to all utilities,—Appellant, Appellee and all others. Such allocations were to be made primarily under the "grandfather clause" on the basis of prior service so that each utility would be assured of all the territory it was then serving as a matter of right; and such additional territory as it could, upon petition and proof, show that the public convenience and necessity required or would require should be certificated to it.

The service area so certificated to the respective utilities were exclusive except where under certain circumstances the Commission should order partial cancellation of their certificates (basically this could be done only in an instance where a utility failed or refused to provide adequate service to a portion of its certificated area). This exclusivity was deemed to be, and obviously was, in the public interest for many reasons, including economy, avoiding the duplication of service facilities, avoiding un-

wholesome or "cutthroat" competition, avoiding what is known in the industry as "pirating" customers, and the like. (Chapter 372, *Mississippi Laws of 1956*, Section 5; Section 7716-05, Vol. 6 Recompiled, *Mississippi Code of 1942*).

In such circumstances the state, in the exercise of its police power, would have been permitted to adopt the Act for alleviation of the problems involved, even if contractual rights had been thereby impaired. Otherwise, municipalities, corporations and individuals could, by their contracts, hinder and impede the sovereignty in the exercise of its police power in the interest of the health, safety, morals, comfort and general welfare of the state as a whole. This principle is universally recognized and sustained by the authorities. In 16 *C.J.S.*, Constitutional Law, Section 281, the principle is expounded as follows:

> "In accordance with the rule that the state may not divest itself by contract or otherwise of its police power, one state legislature cannot by any agreement bind itself or its successors not to exercise the police power of the state. The reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. All contracts are made with reference to the possible exercise of the police power of the government and with the possibility of such legislation as an implied term of the law thereof; and whether made by the state itself, by municipal corporations, or by individuals or private corporations, they cannot extend to defeat legitimate government authority, but are subject to be interfered with, or otherwise affected by, subsequent statutes enacted in a bona fide and appropriate exercise of the police power, and do not, by reason of the contracts clause of the constitution, enjoy any immunity from such legislation, regardless of whether the legislative action affects contracts incidentally, or directly or indirectly.

"This rule is not only reasonable, but necessary, since a rule to the contrary would enable individuals, by their contracts, to deprive the state of its sovereign power to enact laws for the public welfare. . . .

"The foregoing rules have been applied to regulations of public service agencies, of business, of the professions, of the use of public highways, . . ."

The same principle is effectively expounded by the Mississippi Court in the *Delta* case, *supra* (149 So.2d at page 508) as follows:

"United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946, the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature 'reserved the right to pass such laws as may be expedient or necessary in municipal affairs.' *The 1956 Act superseded pro tanto the precedent franchise to United.* The legislature, acting under its police power, had the right to vest in the Commission power, to determine rates." (Emphasis added).

In the case at bar, even if the disputed area had been within the jurisdiction of the City of Clinton in 1946 when the franchise and street lighting agreement were given, such technical "impairment" as might have been involved in its being allocated to Appellee as service area would certainly have been permissible, particularly since Appellee had provided all the electric service in the area

beginning in 1944 and continuing to March 29, 1956, the effective date of the Act; had made large investments therein for the purpose; had held itself out to the public as offering its services therein to all who applied therefor; had actually served all who had applied for service; and its services had been entirely adequate and satisfactory. (Appellee's facilities in the disputed area were reasonably worth $5,801.00, not including "back-up" facilities [R 786 and Exh. 10]; Appellee's facilities in the disputed area were in excellent condition and its service therein was and had always been excellent [R 755, 769, 1231 and Exh. 63]; and as of the date of hearing Appellee had fourteen services in the area, including residential, church and commercial [R 1231 and Exh. 63]). On the other hand, Appellant never at any time offered its services, built any facilities or rendered any service in the disputed area prior to the effective date of the Act.

Therefore, as of March 29, 1956, it is manifest that the state in the exercise of its police power in setting up a statewide system of allocation of service areas, the regulation of rates, services, etc., was empowered in any event to determine that the disputed area should continue to be served by Appellee in the public interest. Any other determination would have meant that the area would have been burdened with two sets of electric utility facilities and field operating expenses of two utilities rather than one, all of which would have to be paid for by the consumers and would be wasteful as well as unsightly and a hinderance to the full use and enjoyment of the land.

D. There Was No Violation of the Fourteenth Amendment to the Constitution of the United States

All that is said under Points A, B and C above is equally applicable in respect of alleged violations of the

due process and equal protection clauses of the Fourteenth Amendment. To avoid repetition it is adopted by reference.

On the effective date of the Act, March 29, 1956, Appellant held no rights by contract or otherwise to provide service to the disputed area. Therefore, the Act by allocating said area to Appellee did not thereby deprive Appellant of any property or right whatsoever; nor did it deny to Appellant the equal protection of the laws.

E. Exclusivity of Service Rights in Disputed Area

Appellant makes a point on exclusivity which is difficult of understanding. Apparently, Appellant questions the right of the State to allocate service areas on an exclusive basis (to the extent that they are exclusive under the Act) and gives as the bases for this point the contract clause and the due process clause of the Federal Constitution.

But in the final analysis, Appellant's implied claim of a right to "share" in the service of the area is predicated on its claim of a franchise from the municipality of Clinton and it has been shown that the franchise literally did not exist in respect of the disputed area on the effective date of the Act. There was, therefore, no reason why this part of Appellee's certificated area should not be certificated under the same measure of exclusivity as all other parts of its certificated service area (being the same limited exclusivity accorded to all utilities throughout the State in respect of their several certificated areas). The feature of exclusivity was provided in the interest of the public, not the utilities.

Actually, Appellant by its pleadings and briefs sought to obtain for itself the exclusive right to serve the dis-

puted area. By its cross-petition it sought to have Appellee take up and remove its service facilities (in place since 1939) and quit the area.

On this point it is enough to say that the State is sovereign; the legislature within the framework of the Constitution may act for the whole people by the passage of laws; nothing in the Constitution limits the right of the legislature to set up by law a statewide system of regulating public utilities, which includes allocation of service areas with limited exclusivity such as that provided for in the Act; and that was done by the legislature in the passage of the Act effective March 29, 1956.

It is inconceivable that a public utility (Appellant) while claiming exclusivity within its own certificated area may complain that its constitutional rights have been impaired because neighboring utilities enjoy a like exclusivity in their respective certificated areas.

The legislature has determined that the limited exclusivity, accorded to all utilities alike, and to be respected by all, is in the public interest. In the absence of constitutional limitation, there can be no question as to the validity of such provision. The legislature was manifestly correct in making the determination (some of the reasons being given above), but there is no occasion for justification here. That is a question for determination by the legislative, not the judicial, branch of government.

F. Authority of Administrator of Rural Electrification Administration to Make Loans

In the Jurisdictional Statement, pages 32 to 39, inclusive, Appellant discusses the authority of the Administrator of the Rural Electrification Administration to make

loans, particularly for the construction of generation and transmission facilities. It is submitted that this discussion does not present a question that is involved in this case, nor is it material to any question in this case.

As best we glean the purpose of the discussion, it is to the effect that in Appellant's view the Rural Electrification Administration should not have (many years ago) made a loan to Appellee, since in the absence of such financing perhaps Appellee would not be thriving in business today and the good parts of its certificated service area, those desired by Appellant, might be available for certification to Appellant.

Certainly Appellee has never borrowed any money from the Rural Electrification Administration to build facilities in a municipality having a population of 1500 or above, nor has it borrowed money to construct facilities for the service of persons who were receiving central station service. (These are two of the limitations upon the Administrator's authority to which Appellant referred). But if it had done so the Administrator is not on trial in this case for exceeding his authority. Indeed, if he had exceeded his authority in this or any other instance only the United States through its proper officers and in a proper proceeding for the purpose could raise the question.

Certainly Appellee does not derive its authority or obligations to the public as a corporation and a public utility from any Act of the Congress. (Appellant asserts (Jurisdictional Statement, p. 37) that the Mississippi Court has "expressly rewritten the federal statute so as to authorize Appellee to pre-empt an area as a public utility.") It is chartered under the laws of Mississippi, its authority, duties and responsibilities as a public utility are granted and imposed by the laws of Mississippi; and

it is operating under those laws. It was organized and is operating under Charter 184, *Mississippi Laws of 1936*, as amended (Section 5463 *et seq.*, Vol. 4A Recompiled, *Mississippi Code of 1942*) and its authority, duties and responsibilities as a public utility are granted by and imposed under the terms and provisions of Chapter 372, *Mississippi Laws of 1956* (Section 7716-01 *et seq.*, Vol. 6 Recompiled, *Mississippi Code of 1942*).

It is submitted that the discussion on this point contained in the Jurisdictional Statement (which was presumably intended to be on Question V set out on page 7 of the Jurisdictional Statement) has no bearing whatever on any question that was involved in the trial or decision of the cause in the state court; and it has no relevancy here.

G. Appellant's Authorities and Argument

It will be seen from the foregoing that Appellant's authorities and argument are beside the point and actually require no further answer or discussion.

Appellant's theory of the case necessarily assumes that it had a franchise and street lighting contract from the City of Clinton covering the disputed area as of the effective date of the Act, March 29, 1956,—pursuant to the terms of which the service rights were granted by the State to Appellee. But such was not the case. The earliest time that those contracts could have become effective as to the disputed area under any circumstances was the date said area was annexed to the municipality, March 25, 1960; and since at that date the State in the exercise of its police power had already granted the service rights to said area to the Appellee, the contracts never became effective as to said area.

Appellant relies upon statutes authorizing municipalities to make contracts and grant easements or franchises for the use of streets and public places in the erection of utility facilities (Sections 3375, 3406 and 3376, *Mississippi Code of 1942*, and Sections 3374-02, 3374-10 and 3374-120, Vol. 3 Recompiled, *Mississippi Code of 1942*) as authority for its assumption that its franchise and street lighting contract covered or affected the disputed area prior to its annexation to the municipality and that the State was therefore precluded from granting the service rights thereto by legislative enactment and certificate to Appellee. But as shown above, the Mississippi Court has expressly and repeatedly held that said statutes do not grant power to municipalities in respect of territory not within their corporate boundaries. Indeed, the Court said in *Delta Electric Power Association* v. *Mississippi Power & Light Company et al., supra,* "When they (the franchise and street lighting contract) were executed by the city, *no statute in this state* authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city." (Emphasis added) Of course, the same was true of the City of Clinton.

Moreover, as shown above, even if the contracts had been effective as to the disputed area on the effective date of the Act, still the Act would have been a valid exercise of the police power of the State.

It is manifest, therefore, that Appellant's authorities and argument are wholly beside the point and require no further answer or discussion.

CONCLUSION

It is, therefore, respectfully submitted that this appeal not only fails to present any substantial federal question, but fails to present any federal question at all.

The Jurisdictional Statement shows upon its face that no federal question is presented in that it shows (Appendices 1 and 2) that under decisions of the Mississippi Court: (1) The City of Clinton had no power or authority except such as was granted to it by state statutes; (2) the statutes relied upon to empower the city to grant rights in the disputed area before its annexation to the municipality did not have that effect; and (3) no other statute of the state had that effect.

Appellee, therefore, respectfully submits that this motion to dismiss the appeal should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. Harvey Hedgepeth, one of the attorneys of record for Capital Electric Power Association, Appellee in the above styled cause, and a member of the bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing motion to dismiss upon Appellants and other interested persons in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, with first class postage prepaid, properly addressed, to each of the attorneys of record for Appellant, Mississippi Power & Light Company, to-wit: Sherwood W. Wise, Electric Building, Jackson, Mississippi; Fred B. Smith, Ripley, Mississippi; Garner W. Green, Electric Building, Jackson, Mississippi; and Joshua Green, Electric Building, Jackson, Mississippi; and to Charles C. Jacobs, Jr., Commerce Building, Cleveland, Mississippi, attorney of record for Mississippi Municipal Association; and to E. W. Stennett, Barnett Building, Jackson, Mississippi, attorney of record for City of Clinton, Mississippi; and to Hardy Lott, 226 Aven Building, Greenwood, Mississippi, attorney of record for Delta Electric Power Association; and to the following who were *Amici Curiae* in the Supreme Court of Mississippi: Everette Truly, City Bank Building, Natchez, Mississippi, attorney for Southwest Mississippi Electric Power Association; Henry Ware Hobbs, Jr., Panzica Building, Brookhaven, Mississippi, attorney for Magnolia Electric Power Association; O. F. and J. O. Moss, Lucedale, Mississippi, attorneys for Singing River Electric Power Association; D. H. Waits, North Broad Street, Leland, Mississippi, attorney for Twin County Electric Power Association; John K. Keyes, Collins, Mississippi, attorney for Southern Pine Electric

Power Association; David C. Welch, The Gardiner Center Offices, Laurel, Mississippi, attorney for Dixie Electric Power Association; J. P. Stone, Coffeeville, Mississippi, attorney for Tallahatchie Valley Electric Power Association; Leon L. Porter, Jr., Stevens Building, Clarksdale, Mississippi, attorney for Coahoma Electric Power Association; Michael D. Haas, 128 Court Street, Bay St. Louis, Mississippi, attorney for Coast Electric Power Association; Ernest R. Duff, Newsom Building, Columbia, Mississippi, attorney for Pearl River Valley Electric Power Association; Griffin Norquist, Williams Building, Yazoo City, Mississippi, attorney for Yazoo Valley Electric Power Association; Thomas H. Watkins, Plaza Building, Jackson, Mississippi, attorney for Mississippi Power Company; and James S. Eaton, 2300 14th Street, Gulfport, Mississippi, attorney for Mississippi Power Company.

This September ....., 1963

.....

T. HARVEY HEDGEPETH

APPENDIX 1

IN THE SUPREME COURT OF MISSISSIPPI

No. 42,480

CAPITAL ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL.

KYLE, JUSTICE:

This case is before us on appeal by Capital Electric Power Association from a decree of the Chancery Court of the First Judicial District of Hinds County, reversing a cease and desist order issued by the Mississippi Public Service Commission on July 6, 1961, upon the petition of Capital Electric, ordering that Mississippi Power & Light Company cease and desist from rendering electric service or street lighting service in an area recently annexed to the City of Clinton, which had been certificated to Capital Electric by the Public Service Commission.

The record shows that Capital Electric Power Association is a Mississippi Corporation organized and existing under authority of the Electric Power Association Act of 1936, Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is a public utility engaged in the transmission and distribution of electricity for lighting, heating and power purposes, and is vested with authority to operate electric services both in and without municipalities. Code Sec. 5478(8). It has the power of eminent domain. Sec. 5474 (16) (14). Capital Electric operates in parts of seven counties in the central part of the state, including the area lying east of

the City of Clinton in Hinds County, and is obligated to render nondiscriminatory service to all persons living in its service areas who apply for such service.

The area involved in this controversy is an area approximately 1/4 mile wide, east and west, and 1/2 mile long, north and south, lying immediately east of the corporate limits of the City as the same existed prior to March 25, 1960. The area is bounded on the north by the right of way line of Clinton Boulevard, on the west side by the city limits as they existed prior to March 25, 1960, and on the south by old U.S. Highway No. 80, and on the east by the north-south half section line running through Section 28, Township 6 North, Range 1 West. The area is referred to in the record and in the briefs filed on this appeal as the "disputed area"; and will be referred to by us in the same manner.

The record shows that Capital Electric began to furnish electric service to persons desiring such service in the disputed area in 1944, and has continued to serve all persons applying for such service since that time. Lines have been added as needed. Such service was being furnished to 14 subscribers, including residential, church and commercial, at time of the hearing of this cause. Neither Mississippi Power & Light Company nor any other electric utility had ever furnished electric service to subscribers in the area prior to the annexation of the area by the City of Clinton on March 25, 1960, except residents of two dwelling houses located on the extreme northern edge for which electric service had been provided by the Company for two of its employees prior to the enactment of Ch. 372, Laws of 1956, and which were "frozen" by agreement of the parties and an order of the Public Service Commission dated September 21, 1959.

The record shows that, after the enactment of the Public Utility Act, Ch. 372, Laws of 1956, which became effective March 29, 1956, Capital Electric filed with the Public Service Commission under authority of paragraph (b) of Section 5 of the Act, commonly called the "grandfather" clause, its application for a certificate of public convenience and necessity authorizing it to continue its operations as a public utility serving the designated areas which were being served by it on the effective date of the Act. The application was entered upon the docket of the Commission as Docket No. U-84. Mississippi Power & Light Company was made a party to the proceeding. After extended negotiations between Capital Electric and the Company for the settlement of area claims, the Commission, by an order entered in Docket No. U-84 on September 21, 1959, granted to Capital Electric a certificate of public convenience and necessity, covering the areas which were being served by it on the effective date of the Act, including the area involved in this controversy. The area certificated to Capital Electric as its service area was described in the order of the Commission by metes and bounds and included the area involved in this controversy. No petition for a rehearing was filed, and no appeal was taken from the final order of the Commission in that matter; and thereafter Capital Electric continued to furnish electric service to its subscribers in the area. The record shows that Capital Electric does not have and has never had a municipal franchise in the City of Clinton. It does not have and has never had a street lighting agreement with the City of Clinton. However, the record shows that a written offer was made by Capital Electric to the City on August 23, 1960, to furnish street lighting service to the City in the disputed area on the same terms as such service was being rendered by Mississippi Power & Light Company.

The record shows that the appellee, Mississippi Power & Light Company, hereinafter referred to as the Company, is an investor-owned public utility incorporated under the laws of the State of Florida and qualified to do business in the State of Mississippi. All of its property is located in the western half of the state. Its general offices are located in the City of Jackson. The Company has operated in Mississippi since 1924. Its current franchise, authorizing the use of the streets, highways and public places in the City of Clinton, was granted by the City on December 6, 1946, for a period of 25 years. On December 16, 1946, the governing authorities of the municipality approved an exclusive street lighting contract with the Company, which provided that, "Company will furnish and municipality will take and pay for its entire street lighting service during the term of this agreement." The contract had been in effect continuously from December 16, 1946, to the date of the hearing.

On November 25, 1959, the Public Service Commission, in Docket No. U-44, granted to the Company a "grandfather" certificate of public convenience and necessity, pursuant to the provisions of paragraph (b) of Section 5, of the Public Utility Act, covering numerous areas in various parts of the state, including the area lying within the corporate limits of the City of Clinton, but not including the area involved in this controversy which at that time was not a part of the City. As in the case of Capital Electric, the Company's "grandfather" certificate described the service areas of the utility by metes and bounds.

The events leading up to the filing by Capital Electric of its petition against the Company in this cause asking for a cease and desist order were substantially as follows: The decree of the Chancery Court of the First Judicial

District of Hinds County, approving the extension of the city limits of the City of Clinton so as to include within the City the area involved in this controversy, along with certain other small areas lying outside of the City, became final on March 25, 1960. On May 3, 1960, the mayor and board of aldermen of the City adopted a resolution authorizing the mayor and clerk to execute in behalf of the City a supplemental agreement with the Company for the furnishing of street lighting in the newly annexed territory. The city clerk thereupon addressed a letter to the Company's manager designating certain locations for new street lights to be installed by the Company on Morrison Drive, and on May 16, 1960, the Company's workmen entered the disputed area and erected a distribution line covering a distance of 1775 feet. The line entered the disputed area on the north at the intersection of the south right of way line of Clinton Boulevard and Morrison Drive and ran in a southerly direction along Morrison Drive to the north right of way line of U.S. Highway 80. The line was built immediately across the street from Capital Electric's line and duplicated Capital Electric's line. The Company also installed five street lights, four of which were located directly across the street from street lights already provided by Capital Electric, which were then in operation. The Company also installed a permanent service line into the newly constructed residence of C. M. Kelley, where Capital Electric Service was already being used for construction purposes.

On May 25, 1960, Capital Electric filed its petition in this cause with the Public Service Commission and asked that, upon the hearing of the petition, the Commission enter an order directing the Company to remove the line so constructed by it in the disputed area, and directing that the Company cease and desist offering its service to

service locations or constructing service facilities within the disputed area. Capital Electric also asked for general relief.

The Company filed its answer to the petition on July 22, 1960. In its answer the Company admitted that on May 16, 1960, it had built the line in question within the disputed area, and that it had served the owner of one residence from that line and had also installed along Morrison Drive five street lights. As matters of affirmative defense, the Company alleged that it was operating under a franchise from the City of Clinton dated December 16, 1946, which was a 25-year franchise and that the rights and obligations conferred by the City upon the Company by that franchise were protected by Ch. 372, Laws of 1956, and particularly by paragraph (g) of Section 5 thereof. The Company further alleged that it was the only supplier of electric energy operating in the City or any part thereof to which a franchise had been granted by the City, and that it was paying the City two per cent of its domestic and commercial receipts derived from its operations within the City. It alleged that Capital Electric had applied to the City for a franchise, and that the mayor and board of aldermen had refused to grant the same.

The Company further alleged that it had received on November 25, 1959, in Cause No. U-44, a "grandfather" certificate to serve the City of Clinton, pursuant to Section 5(b) of the Public Utility Act; that it had an exclusive street lighting contract with the City under which it was presently operating; that its right to furnish electric service in the area which had been incorporated into the city was protected by the due process clause and equal protection clause of the Constitution of the United States and the due process clause of the Mississippi Constitution. The Company alleged that it had offered to purchase from

Capital Electric, or to trade with Capital Electric for other facilities located elsewhere, all facilities which Capital Electric had in the City of Clinton. The Company incorporated in its answer a cross petition in which it asked that Capital Electric be ordered to cease and desist from maintaining its electric distribution service in the disputed area, and to remove its equipment and distribution facilities from the area.

The Mississippi Municipal Association filed a petition asking that it be permitted to intervene on behalf of the municipalities of the state as parties interested in the litigation. The City of Clinton also filed a petition asking that it be permitted to intervene as an interested party. Both petitions were granted by orders of the Commission dated September 16, 1960. The Municipal Association then filed its answer to the petition of Capital Electric; and the City of Clinton filed an answer and cross-petition in which it averred that Capital Electric had no right to continue to operate its facilities in the disputed area after March 25, 1960, for the reason that it had never been granted a franchise to operate within the City.

Extended hearings were held by the Public Service Commission on the issues presented by the pleadings. The hearings were concluded on February 27, 1961. The Commission took the case under advisement, and on July 6, 1961, the Commission rendered its decision in favor of Capital Electric and entered a cease and desist order as prayed for in Capital Electric's petition. The relief prayed for in the cross petitions filed by Mississippi Power & Light Company and the City of Clinton was denied, and the cross petitions were dismissed.

The Commission in its order found that Capital Electric had been granted a certificate of convenience and necessity by the Commission in Docket No. U-84 on Sep-

tember 21, 1959, which authorized it to continue to operate its electric facilities and serve the needs of electric consumers in the area that it was serving on March 29, 1956, the effective date of the Public Utility Act; that the certificate of convenience and necessity contained a particular description of the area involved in this litigation; and that continuously, since March 29, 1956, Capital Electric had been rendering reasonably adequate electric service within the area. The Commission found that the new facilities constructed by Mississippi Power & Light Company in the disputed area were within the areas specifically certificated to Capital Electric by the Commission in Docket No. U-84; and that the Company, unless ordered to cease and desist therefrom, would offer and render electric service to consumers of electric power within the disputed area, and would continue to render street lighting service within the area; that the real issue in the controversy was whether or not the holder of a certificate of convenience and necessity issued by the Commission was entitled to be protected against an invasion of its certificated area by the construction and operation of electric facilities therein by another electric utility which did not have a certificate authorizing it to serve the area. The Commission was of the opinion that the municipal franchise granted to the Company by the City of Clinton was not germane to any of the issues in the cause and had no bearing on the case. The Commission did not pass upon the validity of the franchise or attempt to construe its provisions.

The Commission, by an order duly entered upon its minutes, ordered that the respondent, Mississippi Power & Light Company, cease and desist from rendering any electric distribution service or street lighting service in the disputed area, and that the Company remove "all of its electric lines and facilities, which it has constructed

and is now operating and maintaining within the disputed area," within a period of 30 days from the date of the order. In its order the Commission stated that its decision was based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket Nos. U-44 and U-84; that the first certificate did not include the disputed area; that the second certificate did include the area in question. From that order the respondent, Mississippi Power & Light Company, prosecuted an appeal to the Chancery Court of the First Judicial District of Hinds County. The City of Clinton and the Mississippi Municipal Association likewise prosecuted appeals.

The cause was heard by the chancery court as an intermediate court of appeals upon the voluminous record made during the hearing before the Commission, and on April 20, 1962, that court entered a judgment reversing the order of the Public Service Commission and ordering that the petition of Capital Electric for a cease and desist order be dismissed. The court was of the opinion that the order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton: that, when the City of Clinton extended its corporate limits and annexed adjoining areas which included the disputed area in this cause the certificate of convenience and necessity granted to Capital Electric under the Public Utility Act of 1956, in so far as it covered the disputed area, became ineffective and Capital Electric could not operate within the corporate limits of the City inasmuch as it had not been granted a franchise by the City. The cause is now before us on appeal by Capital Electric from the judgment entered by the chancery court reversing the order of the Commission.

The attorneys for Capital Electric have assigned and argued four main points as ground for reversal of the judgment of the lower court:

(1) That the court erred in holding that when the City of Clinton expanded its corporate limits on March 25, 1960, and annexed the disputed area, the certificate of public convenience and necessity theretofore issued by the Public Service Commission to Capital Electric, under and pursuant to Section 5(b) of the Public Utility Act of 1956, became ineffective in so far as it covered the disputed area; (2) that the court erred in holding that the expansion of the corporate limits of the City of Clinton on March 25, 1960, destroyed the vested service rights acquired by Capital Electric by virtue of its having served the disputed area for many years prior to that date, which rights had been recognized and expressly reserved and granted to Capital Electric by the terms of the Public Utility Act itself; (3) that the court erred in holding that Capital Electric was barred of its right to operate within the disputed area after the annexation by the City for the reason that Capital Electric had not been granted a municipal franchise by the City; (4) that the court erred in its holding that the cease and desist order of the Commission issued on July 6, 1961, was erroneous in law and violative of the statutory rights of Mississippi Power & Light Company and the City of Clinton.

It is argued on behalf of the appellees in support of the judgment of the lower court that the statutes of Mississippi in unmistakable terms, have given to municipalities complete jurisdiction of streets and the absolute right to regulate by franchise the use which can be made of the streets by public utilities; that the power to determine what utilities may operate within and use the streets and public ways of a municipality is definitely vested in the

municipality by Sections 3374-119 and 3371-120, and Section 3374-73, Miss. Code of 1942, Rec.; and that only those acquiring and holding a franchise from the municipality itself can operate a utility therein. It is also argued on behalf of the appellees that it clearly appears from the language used in paragraph (g) of Section 5 of the Public Utility Act that it was the legislative intent that a utility should not be permitted to operate within a municipality wihout first obtaining a franchise from the municipality; that Capital Electric had not been granted a franchise by the City of Clinton, and for that reason the chancery court was eminently correct in its holding that Capital Electric should no longer be permitted to operate in the disputed area since the area had been annexed to and made a part of the City.

The questions of law presented for our decision on this appeal are substantially the same as the questions presented in Delta Electric Power Association v. Mississippi Power & Light Co., et al., Cause No. 42,535, decided by this Court on February 11, 1963. There is no substantial dispute as to the facts in this case, and on the questions of law the opinion rendered in the Delta Electric Power Association Case is controlling here. We think there was error in the court's holding that the cease and desist order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton. We also think that there was error in its holding that the extension of the corporate limits of the City of Clinton so as to include the disputed area within the City rendered ineffective as to that area the certificate of convenience and necessity granted to Capital Electric under authority of paragraph (b) of Section 5 of the Public Utility Act, and in its holding that Capital Electric was barred of its right to operate within the disputed area after

its annexation to the City without first obtaining a franchise from the City.

As stated by the Court in the opinion rendered in the Delta Electric Power Association Case, prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of "grandfather" certificates under Section 5 are made on an area rather than a facility basis; and (2) a certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts. Capital Electric Power Association v. Mississippi Power & Light Co., 240 Miss. 139, 125 So.2d 739; Mississippi Power Co., et al v. East Mississippi Electric Power Association and Public Service Commission (Miss. 1962), 140 So.2d 286.

In Capital Electric Power Association v. Mississippi Power & Light Co., supra, which is generally referred to as the "Elton Case," the Court, in discussing the nature of the right acquired by Capital Electric by virtue of the certificate of convenience and necessity issued to it under paragraph (b) of Section 5 of the Public Utility Act, said: "Capital Electric Power Association is a corporation chartered and operated under Chapter 184, Laws of 1936, Section 5463 et seq., Code of 1942. It is obligated to render nondiscriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor. Capital Electric Power Ass'n. v. McGuffee, 226 Miss. 227, 83 So.2d 837, 84 So.2d 793, 56 A.L.R. 2d 403. Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right

is indeed a valuable one. 'A non-exclusive franchise is a valuable right which can be protected in the courts.'"

In the Delta Electric Power Association case, the court had under consideration the effect of the annexation by the City of Winona of an area lying west of the City, which constituted a part of the service area certificated to Delta Electric by the Public Service Commission and which the Company claimed under a municipal franchise granted by the City many years prior to the annexation; and in its opinion in that case the Court said: "Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not consistent with the terms of the Act or with the legislative purposes."

What was said in the Delta Electric Power Association case is equally applicable to the facts in this case. The Public Utility Act, in our opinion, is not susceptible of the construction contended for by the appellees and adopted by the lower court, that, when the City of Clinton extended its corporate limits and annexed the disputed area the certificate of convenience and necessity granted to Capital Electric under paragraph (b) of Section 5 of the Act, in so far as it covered the disputed area, became in-

effective. If the legislature had intended that awards by the Commission of service areas under the "grandfather" clause of Section 5 of the Act should be only tentative and subject to change in the event a portion of the certificated area lying outside of a municipality on the effective date of the Act should be thereafter incorporated in a municipality, the legislature in our opinion would have expressly provided for such change and for payment of compensation to the utility whose rights were adversely affected.

As to the appellees' contention that paragraph (g) of Section 5 of the Public Utility Act indicates a legislative intent that a utility shall be required to obtain a franchise from the muncipality before operating therein, we think that contention has been fully answered in the opinion rendered in the Delta Electric Power Association case. There is nothing in paragraph (g) of Section 5 to indicate that a utility which has obtained and is operating under a certificate of convenience and necessity issued by the Commission shall have its certificate revoked in whole or in part, or shall be required to apply for another certificate of convenience and necessity, if a part of its certificated area is later incorporated into a municipality.

It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, par. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case.

For the reasons stated above the judgment of the lower court, which reversed and set aside the order of the Public Service Commission, is reversed; and the order of the Public Service Commission is reinstated and affirmed.

REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX 2

IN THE SUPREME COURT OF MISSISSIPPI

No. 42,535

DELTA ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL.

ETHRIDGE, JUSTICE:

This case involves an order of the Mississippi Public Service Commission (called Commission), directing Mississippi Power & Light Company (called Company) to cease and desist from rendering electric distribution service or street lighting service in a newly annexed area of the City of Winona, which was certified by the Commission to Delta Electric Power Association (called Delta). The Mississippi Municipal Association was allowed to intervene. It supported the position of the Company.

The Company and Municipal Association appealed from the Commission's order to the Chancery Court, First Judicial District of Hinds County, which reversed it. That court held that Delta had no right to operate in the disputed area, and ordered Delta to cease and desist from doing so. It

adjudicated that the Company's municipal franchise, upon expansion of the city limits, extended into the newly incorporated area, and thereby superseded Delta's certificate from the Commission, issued when the disputed area was outside the city limits.

The facts are without any substantial dispute. The issues are principally those of construction of Section 5 of the Public Utility Act of 1956, in the light of the facts and several prior decisions. Miss. Laws 1956, Ch. 372; Miss. Code 1942, Rec. Secs. 7716-01 to 7716-38. We conclude the Commission's order was correct, reverse the decree of the Chancery Court, and reinstate and affirm the Commission's issuance of a cease and desist order.

The precise issue is whether, under the Act, the expansion of the city limits extended Company's service area into the annexed area, under its municipal franchise granted prior to the 1956 Act and before the expansion, and superseded the prior grandfather certificate to the annexed tract, granted by the Commission to Delta, which served the area before it came within the city limits. We think it did not, and that Delta's certificate was properly protected by the Commission's order.

Both Delta and Company are public utilities engaged in the transmission and distribution of electricity, and subject to the Public Utility Act of 1956. Miss. Laws 1956, Ch. 372, Sec. ID. Delta is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474 (8). It has the power of eminent domain. Sec. 5474 (6) (14). Delta has the obligation and duty to render non-discriminatory service

to all persons subscribing for it, who live in the areas served by that corporation. Capital Elec. Power Assn. v. McGuffee, 226 Miss. 227, 83 So.2d 837 (1955). It operates in thirteen counties in the state.

Mississippi Power & Light Company, a subsidiary of Middle South Utilities, is incorporated under the laws of Florida, and qualified to do business in Mississippi. All of its property is located in this state, generally in the western one-half from the Tennessee to the Louisiana line.

Delta was incorporated in 1938. In 1940 it constructed an electric line in the vicinity of, but outside the west corporate limits, of the City of Winona. There were no other electric lines in this area, and electric services was not then available to anyone in this rural area. Delta served the only two customers in it who desired electricity at that time. After it was made available, and as a result of this and other factors, this area west of the city limits slowly developed, over a period of years, and Delta obtained other customers. It served all of these additional customers.

On February 23, 1948, the City of Winona granted a franchise to Mississippi Power & Light Company for electric service in that municipality, its streets and public places, "as they now exist or may hereafter be laid out or extended." This franchise was for a period of twenty-five years, so it expires in 1973. Since 1948 Company has been furnishing electric service in Winona under that franchise. During this same period and since 1940, Delta has been furnishing electric service to those desiring it in the disputed area which was west of the city limits prior to December 31, 1959.

In 1948 the City made a street lighting agreement with the Company, for five years, and renewable for similar addi-

tional periods unless either party elected to terminate it. That contract is still in effect.

The Public Utility Act became effective on March 29, 1956. Miss. Laws 1956, Ch. 372, Sec. 40. Before that date there was no statewide regulation by the Public Service Commission or any other state agency of the service areas, rates, or related operations of electric public utilities. Subject to certain limitations, the act vested "exclusive original jurisdiction" over these matters in the Commission. *Ibid.*, Sec. 4.

Section 5(b) provides for grandfather or prior service certificates of convenience and necessity. It states that the Commission shall issue such a certificate to any person engaged in the operation of electric facilities and equipment "for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation," if the application was made within six months after the effective date of the act. Both Delta and the Company filed applications within the six months, and thereafter negotiated over a lengthy period for the purpose of agreeing on areas which they should recommend to the Commission for certification to Delta and Company, respectively. They agreed that the disputed area involved in this suit should be certificated to Delta and that certain other areas should be certificated to Company. Hence they submitted to the Commission a letter of agreement, and map showing the recommended areas of agreement for prior service certificates.

On November 25, 1959, all of the disputed area involved in this suit was certificated to Delta. The Company was a party to that proceeding, did not appeal from it, and the Commission's order, granting the grandfather cer-

tificate to Delta, became final. Delta has continued since that date to serve every electric customer in the area, including two street lights for the City of Winona. Delta's grandfather certificate from the Commission describes the disputed area involved in this suit by metes and bounds, and clearly covers it.

By an ordinance effective December 31, 1959, the City of Winona extended its corporate limits to the north, south, and to the west. The disputed area here involved is part of the western expansion of the city limits, annexed on that date to the municipal boundaries of Winona.

In May, 1960 the Company without any authorization from the Commission, constructed an electric line into the disputed area, previously certificated by the Commission to Delta, extended it to the Hightower property, and in June, 1960 constructed two prongs from this line in the disputed area for the purpose of serving street lights. No electric service was actually rendered to the Hightower property. The street lights were operated for several weeks, when the bulbs were removed.

On May 31, 1960 Delta filed the present petition before the Commission, asking it to order the Company to remove its line from Delta's area and to cease and desist offering its electric service to service locations within areas certificated to Delta. The Company filed its answer and cross-petitioned. It took the position that extension of the city limits expanded its precedent franchise from the city to cover the newly annexed area.

After a lengthy hearing, the Commission's supplemental and amended order of July 18, 1961 ordered the Company to cease and desist from offering electric service and operating facilities within the disputed area. It denied the cross-petition. The Commission found that

Delta's certificate of November 25, 1959 contained a particular legal description of the area certificated to Delta, which included the disputed area; that the Company did not appeal from the order granting Delta that certificate; that since March 29, 1956 Delta has been rendering reasonably adequate electric service within the disputed area; and the Company's certificate did not include any part of that area certificated to Delta. The Commission stated it did not consider the municipal franchise granted to the Company by Winona to be germane to the issues, and did not pass upon the validity of that franchise. It ruled solely on the respective rights of the parties arising out of their certificates of convenience and necessity.

I.

Prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of grandfather certificates under Section 5 are made on an area rather than a facility basis; (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts.

An electric power association is under an obligation to render electric service upon a nondiscriminatory basis to its members and to other persons living in the area. Capital Electric Power Assn. v. McGuffee, 226 Miss. 227, 243, 83 So.2d 837, 84 So.2d 793 (1956). A non exclusive franchise is a valuable right which can be protected in the courts. Miss. Power Light Co. v. Miss. Power District, 230 Miss. 594, 611, 93 So.2d 446 (1957); Payne v. Jackson City Lines, Inc., 220 Miss. 180, 70 So.2d 520 (1954).

In Miss. Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 106 So.2d 375 (1958), it was held that a revenue

bond issue, to provide funds for acquisition of electric distribution facilities in a municipality, was void because of defective notice. Whether an electric power association should be permitted to "invade an area" already having electric utility service furnished by the company was first for determination by the Commission. The opinion discussed briefly Section 5 of the Act, recognized the right under Section 5 (b) to a grandfather certificate, and observed that under the second paragraph of Section 5 (d) provision is made for more than one utility operating within a municipality. 234 Miss. at 634.

United Gas Corp. v. City of Philadelphia, 239 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946 the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature "reserved the right to pass such laws as may be expedient or necessary in municipal affairs." The 1956 Act superseded pro tanto the precedent franchise to United. The legislature, acting under its police power, had the right to vest in the Commission power to determine rates.

Capital Electric Power Assn. v. Miss. Power & Light Co., 240 Miss. 139, 125 So.2d 739 (1961) (called the Elton case), spelled out in some detail the rights of a holder of a certificate of public convenience and necessity from the Commission. The Elton Company operated a wood-ship-

ping plant three miles south of the City of Jackson. Capital Electric had been serving the area for 17 years, and obtained from the Commission a grandfather certificate under the 1956 Act, which covered the area involved. Nevertheless, Miss. Power & Light Company applied for a certificate to construct lines to Elton, pursuant to its contract with it. The Commission's issuance of a certificate to Mississippi Power was affirmed by the circuit court, but on appeal that judgment was reversed.

Section 5 of the Act was discussed in some detail. Capital Electric was "obligated to render non-discriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor." Hence it was said that, having served the electric requirements in this area for 17 years, Capital Electric under Section 5(b) acquired the right to a certificate, "being in truth and in fact a franchise from the State. Such right is indeed a valuable one", although nonexclusive. By the Act "it was the intention of the legislature that facilities of one utility should not be duplicated in the same area"; that there should not be "duplication and overriding facilities and certificates." Hence it was said "An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear."

For emphasis, it was stated: "There should no longer be any doubt as to the rule in this State on that proposition." The Commission could not disregard the requirements of a grandfather certificate under Section 5(b). In summary, the opinion held: "To allow the invasion of Capital Electric's area on account of the desire of Elton Company, regardless of their reasons therefor, to be served by Mis-

sissippi Power & Light Company would lay down a principle which would result in endle s duplication and make a shamble of the utility act. Such a policy cannot be countenanced by this Court."

Miss. Power Co. v. East Miss. Elec. Power Assn., 140 So.2d 286 (Miss. 1962), involved principally an area within one mile around and adjacent to the City of Louisville. Louisville's Electric System contended that, under Sec. 1H of the Act, it had the sole right and privilege of operating within the one mile corridor. That provision stated that any public utility owned by a municipality should not be subject to the provisions of the Act, excep. as to extensions of utilities greater than one mile outside of corporate boundaries after the effective date. This provision was not a grant, but an exemption from regulation, limited in terms.

East Mississippi had been serving the outside area prior to and on the Act's effective date. It was held the legislature did not intend by this exemption "to take from a company that was operating within said corridor on the date of the Act its right to operate therein," and the Commission was justified in certificating the area to East Mississippi. Whether its certificate could be invaded depended upon whether the Commission found it rendered inadequate service, and failed to remedy it. The award of a certificate, it was held, is made on an area rather than a facility basis. *Capital Electric* so held. Moreover, East Mississippi was a public utility in statutory contemplation. Cf., Miss. Public Service Commission v. Holloway Transfer & Storage Co., No. 42,476, decided January 14, 1963 (Motor Vehicle Act).

In short, prior decisions under the Public Utility Act of 1956 hold that certificates to public utilities are based on an area basis, are valuable rights, although nonexclusive, entitled to protection of the courts, and the Commis-

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sion (under Section 4) has "exclusive original jurisdiction over the intrastate business and property of public utilities." Cf., Miss. Code 1942, Rec., Secs. 5490-5497 (1938 preemption statutes for power assns.)

II.

Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not Consistent with the terms of the Act or with the legislative purposes.

The title of Ch. 372, Laws of 1956, states it is an act to "vest authority" in the Commission "to regulate certain public utilities." The preamble reveals legislative concern with utility services "both within and outside of municipalities," and the purpose to vest controlling power in the Commission "to regulate such utilities' rates and services." Section 4 gives it "exclusive original jurisdiction," with certain exceptions. There is no indication that a municipal expansion of boundaries would supersede a prior certificate from the Commission.

Subsection (d) of Section 5 is aimed at the precise issue involved here: "Where there shall be two (2) or more

persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. . . ."

Subsection (d) recognizes that two public utilities, such as Delta and Company, may hold certificates for similar operations in the same municipality. It authorizes operations to be carried on by them "within their respective certificated areas," and exempts them from further application for extension of their facilities within their "respective certificated areas of said municipality, including any extensions of the corporate limits thereof." In other words if such utilities extend or add to their facilities within their respective certificated areas of the city, which would include extensions of corporate limits of the city, they are exempt from further application to the Commission for such extensions or additions. This assumes the annexed areas are within the respective certificated areas of the two utilities.

The second paragraph of subsection (d) recognizes that both "co-operatives" and other utilities may operate within a municipality at the same time, and in such event they are subject to rate regulation. In short, subsection (d) specifically applies to and recognizes the existence of a situation such as that here presented, where Delta and the

Company have respective certificated areas in the municipality, under the extension of the city limits. Section 5 (d) applies to certificate holders for areas subsequently annexed to municipalities. This is evidenced from the phrase, "including any extensions of the corporate limits thereof."

Subsections (b), (c), and (d), of Section 5, must be read together. Subsection (b), mandatory in nature, requires the Commission to issue a grandfather certificate where a person, as defined, is engaged in the operation of facilities on the effective date of the Act, March 29, 1956. Subsection (c) provides that "in all other cases" the Commission shall have a hearing on certificate applications, "provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality *being served by the holder of a certificate of convenience and necessity*, . . ." (emphasis supplied) Hence if there is only one holder of a certificate within a municipality, then it can construct extensions anywhere in the corporate limits without further application to the Commission. However, under subsection (d), where there are two holders of certificates in the same municipality, then each holder is only exempt from further application to the Commission for extensions *within its own certificated area* of the municipality.

The quoted part of subsection (c), upon which Company relies, must be considered along with subsection (d). When read together, the foregoing interpretation renders both subsections consistent with one another, the terms of the statute, and a reasonable exercise of legislative discretion. Accordingly, under subsection (d), when there were two persons holding valid certificates for electric operations in separate areas in Winona, as extended, these certificate holders had the right to carry on their operations in their respective certificated areas within the

municipality, without making further application to the Commission for extensions and additions of their facilities, within their respective certificated areas.

The reference in subsection (d) to "respective certificated areas" reflects a legislative intent to exempt the holder of a certificate, and not the holder of a municipal franchise. Throughout Section 5, the statute uses the words "certificate" and "franchise" correctly and distinctly. If the legislature had intended to exempt the holder of a municipal franchise, then it would have used the term "municipal franchise" instead of the word "certificate." When it referred to extensions "within their respective certificated areas," it intended areas which had been certificated by the Commission, not areas for which a municipal franchise only had been issued. If it had intended the latter, it would have said so.

Furthermore, subsection (b) made it mandatory for the Commission to issue a certificate to Delta for the areas it was serving outside the then corporate limits of Winona. The legislature knew that corporate limits sometimes expand. If it had intended the Commission should not issue certificates for areas near corporate limits, in view of possible future expansions, then presumably it would have so stated, and not used the mandatory language of subsection (b).

The phrase "municipal franchises" is used numerous times in Section 5. Yet it does not provide that when a certificated area is taken within a municipality, the Commssion's certificate would be cancelled. The clear inference is that the legislature did not intend that result. Moreover, there is no provision that, after a certificate has been issued by the Commission, it shall be necessary, after

corporate limits are extended, for a municipal franchise also to be obtained.

Nor is there any direction that a municipal expansion shall cancel or in any way affect a Commission certificate. The exclusive method for cancellation of such a certificate is prescribed in subsection (f), Section 5, where a utility is not rendering reasonably adequate service, and fails to do so after ordered to correct it. Yet Company's argument would add an additional ground for cancellation of a Commission certificate, namely, where a municipality has extended its corporate limits into a previously certificated area. The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods. 50 Am. Jur., Statutes, Secs. 244-46; Tepper Bros. v. Buttross, 178 Miss. 659, 664, 174 So. 556 (1937).

The next to last sentence of subsection (e) contemplates power associations operating within a city and paying for that privilege. It says that any co-operative operating "within *any area* of a municipality" shall pay it two percent of gross revenue from inside sales. Furthermore, the first sentence of Section 5 provides that no person shall construct, acquire or operate equipment for distribution of electricity "without first having obtained from the Commission a certificate." There is no exception which would authorize a municipality, by issuing a franchise, to excuse this requirement of a certificate.

Subsection (e) recognizes that a public utility, which holds "a certificate of convenience and necessity granted under the provisions of this act covering the geographical area of such municipality," may after the expiration of a "municipal franchise" continue to use the streets upon condition of payment of compensation therefor at the rate of

two percent of sales to customers within the city. Nevertheless, the utility must have a certificate from the Commission.

Subsection (g) of Section 5, upon which Company particularly relies, has a restricted application. It constitutes a limitation on the Commission, as of the time of issuing a certificate, for an area which at that time is in a municipality. It prohibits the Commission from issuing to a utility a certificate for an area *then* in a municipality, unless the utility has a franchise from the municipality. It presupposes the pending application is for a certificate. Here Delta is not seeking a certificate for any service territory. It already has a valid certificate covering the disputed tract, granted to it by the Commission before the expansion of the city limits, and at a time when no part of the area was within the corporate limits.

Subsection (g) also presupposes that an applicant for a certificate within a municipality has a municipal franchise, which it must attach to its application. Moreover, it does not require that any further application be filed after a certificate is once granted by the Commission. This construction is further supported by the third sentence of subsection (g). It states that if a municipality arbitrarily refuses to grant a franchise to a utility "now operating within said municipality," then the utility can obtain a Commission certificate for a municipal area without having a franchise. See Miss. Valley Gas Co. v. City of Jackson, 236 Miss. 81, 109 So. 2d 637 (1959). The phrase "now operating" refers to the effective date of the Act, March 29, 1956. No similar relief was provided for a utility holding a certificate for an area outside of a municipality, which is taken into it after that date, and the franchise arbitrarily is denied. This omission warrants the conclu-

sion the legislature intended that, when a certificate was once validly granted, (as it was to Delta), it would remain valid even though the area was subsequently annexed by a municipality; and that such annexation would not make it necessary for the utility to apply again for the area already certified to it. If that were not so, the legislature as a matter of equality would have afforded presumably the same relief from arbitrariness to a utility whose certificated area was brought into a city by a municipal expansion.

III.

In the drafting of Section 5 of the Act, the legislature was aware manifestly of municipal franchises, Commission certificates, and extensions of corporate limits. It mentioned all of them in the Act. If it had intended that extension of municipal limits would cancel, modify, or affect in any way a certificate of convenience and necessity from the Commission, it no doubt would have provided for such cancellation. There is no such directive. To read into the Act a requirement that any extension of municipal limits would cancel *pro tanto* a certificate from the Commission would be unwarranted.

Moreover, it would impute to the legislature an intent inconsistent with its purpose to avoid duplicating facilities. The dominant policy which the legislature had in view must be considered. See Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768 (1935); Sheffield v. Reece, 201 Miss. 133, 143, 28 So.2d 745 (1947); Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 510-511, 62 So. 2d 772 (1953). This maintains the *status quo* in the disputed area.

Subsection (d) authorizes two electric utilities to serve separate certificated areas in the same municipality. This would result in no duplication or inconvenience, the legis-

lature apparently concluded, although the contrary might well be the case where two transit companies are serving in one city. At any rate, subsection (d) of Section 5 makes it clear that two utilities may hold certificates from the Commission for separate areas in the same municipality. The legislative history in the Senate, as reflected in the Journal, is too sketchy and indefinite to be of assistance in the Act's interpretation on the present issues. Miss. Senate Journal, 1956, pp. 327, 329, 353-359, 391, 405-408, 510, 540-542, 575. Moreover, the statute as finally enacted is the controlling guide.

A municipality in Mississippi is a creature of the State. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant utility franchise and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs. 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation.

All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to

Company, did not supersede Delta's certificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power over areas then outside of municipalities, nor its power to control and regulate municipal activities.

Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. So. Bell Tel. & Tel. Co. v. Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

IV.

Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec.

10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26 (d) (scope of review).

There was no error in the Commission's overruling Company's plea to its jurisdiction, and the motion to dismiss Delta's petition. Appellant did not seek any relief against the City of Winona. It only sought an order directing Company to remove its lines in the disputed area, relying upon its certificate from the Commission. Hence

the city was not a necessary party to the suit. Moreover, at Company's instance, the Commission struck from Delta's pleading allegations attacking validity of the franchise, and properly ruled that it had no power to pass upon that issue.

Stegall v. City of Jackson, 141 So. 2d 236, 143 So. 2d 298 (Miss. 1962), does not affect this case. It held only that land developers who, without authority, laid sewer lines in streets and county roads, without any recorded reservation, dedicated that system to the public use, and could not recover its value from the city which annexed the area. However, *Stegall* (141 So. 2d at 241) referred to Gwin v. City of Greenwood, 150 Miss. 656, 115 So. 890, 58 A.L.R. 849 (1928), which has some relevancy here. There the owner of a subdivision outside of the city limits dedicated the streets, but reserved the exclusive right to operate water and sewer lines thereon. Later the city extended its boundaries to include this area. It was held the municipality had no right to enjoin Gwin from interfering with its extension of water mains. The reservation in the dedication reserved in the dedicator a private right of property, when the reservation was made before the area was brought into the city limits.

Appellees argue as analogous precedents from other states several cases in which municipalities have extended their boundaries, affecting previously acquired utility rights in the annexed area. Farmers Electric Co-op. Corp. v. Ark. Power & Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act. No. 85, and Ark. Laws 1957, Act. No. 103; Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944); Omaha Transit Co. v. Briggs, 167 Neb. 703; 94 N.W.2d 461, 28 PUR 3d 26 (1959); Whitaker v. Louisville Transit Co., 274 S.W.2d 391 (Ky.

1954); Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N.E. 170 (1933); Deneen v. Houghton Co. St.-Ry. Co., 150 Mich. 235, 113 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); Public Service Co. v. Public Utility Comm. of Colo., 142 Colo. 135, 350 P.2d 543 (1960); Clarke-Washington Elec. Membership Corp. v. Ala. Power Co., 272 Ala. 598, 133 So. 2d 488 (1961). These cases are not persuasive here. They are based essentially upon the particular statutes and constitutional provisions of the specific states. They involve issues and statutes different from those arising under the Public Utility Act of 1956.

In summary, on the direct appeal by Delta, the judgment of the chancery court, which reversed and set aside the order of the Public Service Commission, is reversed. The order of the Commission is reinstated and affirmed. Appellees' cross appeal on the jurisdictional issue is without merit. Hence on the cross appeal the case is affirmed.

ON DIRECT APPEAL, REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED: ON CROSS APPEAL, AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX 3

Sections 1, 4, 5, 6, 22, 26 and 28 of Chapter 372, *Mississippi Laws of 1956* (Sections 7716-01, 7716-04, 7716-05, 7716-06, 7716-22, 7716-26 and 7716-28, Volume 6 Recompiled, *Mississippi Code of 1942*)

Section 1. *Definitions.* A. The term "corporation," when used in this act, includes a private or public corporation, a municipality, an association, a joint stock association or a business trust.

B. The term "person," when used in this act, includes a natural person, a partnership of two (2) or more persons having a joint or common interest, a co-operative, non-profit, limited dividend or mutual association, a corporation as hereinbefore defined, or any other legal entity.

C. The term "municipality," when used in this act, includes any incorporated city, town or village.

D. The term "public utility," when used in this act, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) The generation, manufacture, transmission or distribution of electricity to or for the public for compensation.

(2) The transmission, sale, sale for resale, or distribution of natural, artificial, or mixed natural and artificial gas to the public for compensation by means of transportation, transmission, or distribution facilities and equipment located within this state, but shall not include the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, nor the distribution or sale of liquefied petroleum gas.

(3) The transmission, conveyance or reception of any message over wire, or by radio, or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation; and the furnishing, or the furnishing and maintenance, of equipment or facilities to the public, for compensation, for use as a private communications system or part thereof; provided, that no persons or corporations not otherwise a public utility within the meaning of this act shall be deemed such solely because of engaging in this

state in the furnishing, for private use as last aforementioned; and provided further that nothing in this act shall be construed to apply to television stations, radio stations or community television antenna services.

(4) The transmission, distribution, sale or resale of water to the public for compensation.

(5) The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity described in sections 1 D (1), 1 D (2), 1 D (3) and 1 D (4) of this act only to himself, his employees or tenants as an incident of such employee service or tenancy, and provided such services are not sold or resold to such tenants or employees on a metered or consumption basis.

E. The term "rate," when used in this act, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility for any service, product or commodity described in this section, offered by it to the public, and any rules, regulations, practices or contracts relating to any such compensation, charge, fare, toll, rental or classification; except, however, the term "rate" shall not include charges for electrical current furnished, delivered or sold by one public utility to another for resale.

F. A public utility's business other than of the character defined in subparagraphs (1) to (4) of subsection D of this section is not subject to the provisions of this act.

G. The word "commission," when used in this act, shall refer to the Public Service Commission of the State of Mississippi as now existing, unless otherwise indicated.

H. Any public utility as defined in paragraph D above, owned or operated by a municipality shall not be subject

to the provisions of this act, except as to extension of utilities greater than one mile outside of corporate boundaries after the effective date of this act.

* * *

Section 4. *General jurisdiction and powers.*—Subject to the limitations imposed in this act, and in accordance with the provisions hereof the commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities as herein defined, except and provided, however, that the commission shall not have jurisdiction over the production and gathering of natural gas, or the sale of natural gas in or within the vicinity of the field where produced, nor over the facilities and equipment utilized in any such operations including but not limited to such facilities as separators, scrubbers, and gasoline plants of all types. Provided, further, the commission shall not have jurisdiction to regulate the rates for the following sale of commodities or services: (1) sales of gas, water or electricity by municipalities to such persons as said municipalities are authorized by law to serve; (2) sales of gas or electricity by co-operative gas or electric power associations to the members thereof as consumers, except as provided by section 5, paragraphs (d) and (e) where service is rendered in a municipality.

Section 5. *Certificate of public convenience and necessity: when required.*—No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1, of this act, without first having obtained from the commission a certificate that the

present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no

certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their factilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public conven-

ience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) and in the case of a utility defined in 1 D (3) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive

jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

In the case of a public utility as defined in section 1 D (3) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

Section 6. *Extension of service.*—The commission may, after hearing, upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities within the certificated area upon findings and order that

such extension is reasonable and practicable, and provided further, that in the case of gas and water a sufficient supply is available and obtainable therefor.

* * *

Section 22. *Decision.*—After the conclusion of a hearing, the commission shall make and file its findings and order, and its opinion, if any. All findings shall be supported by substantial evidence presented in the hearing and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding, and the basis of the commission's conclusion. A copy of such order certified under the seal of the commission, shall be served upon the person against whom it runs, or his attorney; and notice thereof shall be given to the other parties to the proceedings or their attorneys. Said order shall take effect twenty (20) days after the service thereof, unless otherwise provided, and shall continue in force, either for a period which may be designated therein or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within twenty (20) days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

* * *

Section 26. *Review.*—(a) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for rehearing has

been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's or-

der as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

* * *

Section 28. *Appeals.*—Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

If the party taking the appeal has theretofore furnished security as provided in section 27 of this act, or, in the case of an appeal from a judgment involving an order of the commission affecting rates, has filed a bond conditioned as provided in section 10 or section 27, the taking of an appeal to the Supreme Court shall operate as a supersedeas without the furnishing of further security or bond, provided, that in such cases the Supreme Court may, upon application to it, require such additional security, or such additional bond conditioned as provided in section 10 or section 27, as in its opinion will adequately secure the other party to the appeal, or parties who may become entitled to refunds, against loss in the event the judgment under review is affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 403

MISSISSIPPI POWER & LIGHT COMPANY AND
MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

APPELLEE'S MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF MISSISSIPPI; AND BRIEF IN SUPPORT THEREOF

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BRIEF IN SUPPORT THEREOF

I.

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee moves the Court to dismiss this appeal from the Supreme Court of Mississippi on the ground that it does not present a substantial federal question because: (1) there is no federal question other than the constitutional issue raised by appellants and (2) the constitutional issue is not substantial because appellants have no vested rights which are protected by the Con-

stitution of the United States and, further, if appellants did have any vested rights they would be subordinate to the police power of the State of Mississippi exercised herein.

II.

The facts on which this motion is based are:

Appellant Mississippi Municipal Association has no interest in the subject matter of this litigation, and does not claim any rights to be adjudicated herein. We will use the term "appellant" to designate the appellant Mississippi Power & Light Company. All references herein to the record will give the volume number in Roman numerals followed by the page number.

Appellant and appellee are electric utilities. The service area in dispute between them (herein called the disputed area) is a small area that was outside the boundary of any municipality until December 31, 1959, when the municipality of Winona, Mississippi, extended its west corporate limit to include the disputed area.

Appellee had first begun serving the disputed area with electricity in 1940 at a time when there were only two customers in the area and electric service was not then available to it. On March 29, 1956 (the effective date of the Public Utility Act of Mississippi, herein called the Act), and on December 31, 1959, when Winona extended its corporate limits, appellee was rendering excellent electric service to everyone in the disputed area. Neither appellant nor any other electric utility was operating or had ever operated in the disputed area. (IV, 613-25, III, 453-551)

On November 25, 1959, the Public Service Commission of Mississippi, by order rendered in its cause numbered U-117, certificated the disputed area to appellee as its

service area under the provisions of the Act appearing at page A41 of Appendix 4 to Appellant's Jurisdictional Statement herein. Appellant was a party to that cause, did not appeal therefrom, and the order of November 25, 1959, became final. In fact at the time the certificate was issued to appellee the appellant did specifically in writing to the Public Service Commission agree not to interpose any objection to the granting of the certificate to appellee for the disputed area and did further waive any right to appeal from the order granting the certificate to appellee on account of the boundary of the area or the granting of same "or in any way to attack or contend that the Public Service Commission did not have the power or authority to grant the areas" to appellee or to contend that the Commission "should not have done so." (IV, 618-22) Appellee continued to serve every electric customer in the disputed area, and constructed additional lines therein for that purpose. (III, 424-33, 450, 453-551)

Thereafter by ordinance effective December 31, 1959, Winona extended its corporate limits to include the disputed area. Thereafter and in May, 1960, the appellant, without any permission or authority from the Public Service Commission and therefore in violation of the first paragraph of the Act set forth in its Appendix 4, constructed an electric line to a vacant lot in the disputed area. (III, 453-551)

On petition of appellee and after a lengthy hearing the Public Service Commission ordered appellant to take down its duplicating and useless line just mentioned and to cease offering electric service in the disputed area that had been certificated to appellee as its service area. (VI, 1090)

This order was affirmed by the Supreme Court of Mississippi by its opinion appearing as appellant's Appendix 1-A.

Appellant's sole claim to any vested right in the disputed area is based on the following: In 1948 Winona granted appellant a non-exclusive municipal franchise permitting appellant to construct and maintain its electric lines and poles "upon and across all streets, alleys, ways, bridges and public places and other municipal property in said municipality, as they now exist, or may hereafter be laid out or extended," . . . (Appellant's Appendix 6, p. A48); and in the same year appellant contracted with Winona to furnish Winona its "entire street lighting service." (Appellant's Appendix 7, p. A51) At the time that the franchise and street lighting contract were executed and at the time Mississippi enacted its Public Utility Act and at the time that the disputed area was certificated by the State of Mississippi through its Public Service Commission to appellee as its service area, the disputed area was outside the boundaries of Winona and therefore beyond the jurisdiction of Winona; and at those times the appellant did not have a customer or a line or any property of any kind in the disputed area. The appellant's claim is that its non-exclusive franchise from Winona (which had no jurisdiction over the disputed area) gave appellant a vested right in the disputed area of such potency as to forever preclude the State of Mississippi in the exercise of its police power from awarding the disputed area to appellee or any other utility as its service area. The effect of this contention is to say that the State of Mississippi is powerless to grant a utility franchise to any territory in Mississippi that will be good against appellant because Winona might some day acquire jurisdiction of it by expanding its municipal boundaries.

III.

BRIEF AND ARGUMENT

A. Appellant Has No Rights Which Are Protected by the Constitution of the United States.

Appellant urges that the enactment of the Mississippi Public Service Commission Act, Sections 7716-01 *et seq.*, Mississippi Code of 1942, impaired the obligation of its non-exclusive franchise and street lighting contract with the municipality of Winona, and also deprived appellant of property rights in the said contracts; which actions are alleged to be violative of Art. I, Section 10, and the Fourteenth Amendment of the U. S. Constitution. Appellee respectfully submits that there is no merit in either of these contentions for the reason that Art. I, Section 10, and the 14th Amendment protect only *vested* rights, and appellant has no vested rights.

1. Appellant Is Not Protected by the 14th Amendment.

Contractual rights may be "property" within the meaning of the 14th Amendment, and such rights may be within the prohibition of that Amendment; however, this is so only if the contractual rights are vested. Mr. Justice Brandeis in delivering the opinion of the Court in *Lynch* v. *United States*, 292 U.S. 571, 78 L. Ed. 1434 (1934), made the following distinction:

> "Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. (Citing cases) On the other hand War Risk policies, being contracts, are property and create vested rights."

This language does not mean that all contracts are property within the 14th Amendment; but that they are such only if they create vested rights. See 16A C.J.S., Constitutional Law, Section 599(b) and (c), which latter section says:

> "The due process clauses protect vested rights only, and have no reference to mere concessions or privileges which the public authorities may control, and bestow, or withhold, at will, . . . nor do due process clauses apply to supposed property rights which a state court has found to be nonexistent, or which are in fact nonexistent, or to rights or interests which have not become vested and are open to doubt or controversy."

In *Fox River Paper Company* v. *Railroad Commission of Wisconsin*, 274 U.S. 651, 71 L. Ed. 1279 (1927), the Paper Company asserted a right as riparian owner to maintain and make improvements on a dam which it had owned since 1878 without having to comply with a statute of Wisconsin which said that the Paper Company must first receive a permit from the Railroad Commission. The Paper Company contended that the statute of Wisconsin violated the 14th Amendment in that it took its property without compensation, since a condition to the granting of a permit was that the company agree that the State could take over the dam after 30 years upon paying compensation. In upholding the statute, the Supreme Court said:

> "Plaintiff's (Paper Company) case rests on the contention that by the law of Wisconsin the rights vested in riparian owners include the right to use the water power and for that purpose to dam the river, subject only to the exercise by the state of its police power to regulate the use of navigable waters in the public interest, and to protect public health and safety; that to withhold from plaintiffs, as the state does under the statute, the right to use their own property

unless they agree to surrender it to the state at a price which may prove at the time of transfer to be less than its true value, is a taking of property without due process, prohibited by the 14th Amendment.

". . . The point first to be determined is whether the plaintiff's description (of his rights under Wisconsin law) is accurate. . . . (The state court held) The right of the riparian owner to develop water power by the construction of the dam remains inchoate until the state has given its consent.

". . . We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. . . . It is for the state court, in cases such as this, to define rights in land located within the state, and the 14th Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.

"We accept as conclusive the state court's view of the nature of the rights of riparian owners. . . ."

It is respectfully submitted by the appellee that the Fox River case controls the case at bar. In the case here, the Mississippi Supreme Court found that appellant had no right in the territory outside the municipality of Winona in 1956 (the date of the alleged unconstitutional statute):

"Appellees (appellants here) contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. . . . We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted company (appellant here) by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which

was then outside of municipal limits. When they were executed by the City, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the City. Winona's power was confined to its corporate limits. The City had no extraterritorial power of any kind to grant company any rights in the disputed area when the contracts were executed.

"On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta (appellee here) a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the State. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta (appellee here) by the Commission under the Act attached to the disputed area." 149 So.2d at 513-14.

Thus, it would appear that under state law, as in the Fox River case, the appellant had no rights at all to be protected by the 14th Amendment or the contract clause of the Federal Constitution. However, even if this were not so, it can be demonstrated that whatever rights appellant did have by the franchise and contract were not vested rights. In *Cobb* v. *City of Malden*, 105 F. Supp. 109 (1952), in which school teachers claimed that their salary contracts were violated contrary to the 14th Amendment by an Act of the Massachusetts Legislature, the Court said:

". . . Valid contracts are property and as such cannot be interfered with without due process of law. . . . However, it seems that a given contract must become fixed and binding on the parties before any property rights vest in relation to it. Did the rights of the present plaintiffs to this salary increase under their contracts vest before the alleged illegal action was

taken by defendants in this case? In my opinion they did not. It is true that plaintiffs had valid subsisting contracts at the time of the passage of Chap. 29. But some of the terms of these contracts were subject to revision from time to time, such as the amount of compensation plaintiffs were to receive. Before the salary increases involved here were voted by the School Committee, Chap. 29 had been passed and that ordinance in effect provided that no school teacher should be absolutely entitled to a pay raise voted by the School Committee if it was later nullified by a special vote of the people at large. For all purposes and effects a new term had been inserted in the employment contracts which said that the School Committee no longer had the final say in every case as to how much pay the teacher could receive. Plaintiffs could not be deprived of property to which they had no absolute claim.

"All of the plaintiff's contentions must fall, because it appears factually that they did not have an absolute unconditional property right in the salary increase voted by the School Committee."

In *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 16 S. Ct. 705, 40 L. Ed. 838 (1895), in defining vested contract rights, the Court quoted from Cooley, Constitutional Law, 332, as follows:

". . . rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting."

Under this definition of "vested", it is impossible to see how appellant had anything other than contingent and expectant rights in the disputed area. Winona might never have expanded its corporate limits; and indeed the State of Mississippi may have taken away the powers of Winona to do so. If this is so, how can it be said that appellant acquired any rights by a contract with the City of Winona, when Winona had no power over the subject matter of the contract? It is admitted that a city may make a contract with reference to its boundaries as they may "now or hereafter exist", but such a contract certainly doesn't give the contractee any vested rights in all the territory outside the city; and for the same reason, it therefore gives no rights in any of the territory outside the corporate limits. At most, then, all the contractee can be said to have is a contingent and expectant right; and as pointed out, such a right is not protected by the 14th Amendment.

2. Appellant Is Not Protected by Art. I, Section 10.

As set forth above the 14th Amendment protects only vested rights, and not those rights which are non-existent under state law or merely contingent and speculative. This same rule applies with equal force to the prohibition of Art. I, Section 10, against impairing the obligations of contracts; but it was thought that a clearer presentation could be made by separating the two points.

In *Ochiltree* v. *Iowa R. R. Contracting Co.*, 21 Wall. 249, 22 L. Ed. 546 (1875), a constitutional provision of Missouri enacted in 1865 made all stockholders of private corporations liable in double the amount of their stock. This constitutional provision was changed in 1870 so that the liability did not extend beyond the amount of subscribed and paid up stock. The defendant in this case had bought stock after 1870 by an original subscription of

stock; but the plaintiff sought to hold him liable doubly since plaintiff's judgment on a debt was obtained before repeal of the constitutional provision. The State Supreme Court held that the Amendment of 1870 relieved stockholders subscribing after 1870 from the effects of the former constitutional provision as to debts contracted prior to the Amendment; and the plaintiff contended in the United States Supreme Court that therefore the Amendment of 1870 impaired the obligations of his contract.

The Supreme Court, in affirming, said:

> "The law of the contract in this case undoubtedly gave the plaintiff the right to subject existing stockholders in the corporation, with whom the debt was contracted, to the double liability provision. . . . What right had he (the plaintiff) to assume that other stock would be taken? It may be that he expected this would be done, and that thereby his security would be increased; but the obligations of a contract within the meaning of the Constitution is a valid, subsisting obligation, not a contingent or speculative one. It was no part of the obligation of contract that future stock should be taken. The value of it would be enhanced if this were done, but the obligation of it would be the same whether the stock were taken or not. . . . But suppose no additional stock were taken, the plaintiff has all that he trusted, and has no right to complain that his contract is not as valuable as he thought it would be."

The same is true of the case on appeal here, viz., it was no part of the obligation of appellant's contract with Winona that Winona expand its limits so as to include the disputed area. It may be that appellant hoped this would be done; but whatever rights appellant acquired by said contract can only be contingent and speculative—and, as in Ochiltree, are not protected by the contracts clause of the federal Constitution.

Again, in *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 16 S. Ct. 705, 40 L. Ed. 838, quoted *supra*, the Court held that contingent or expectant rights in a contract are not protected from subsequent legislation impairing or abridging those contingent rights. In that case, the charter of the Minneapolis and St. Cloud Railroad Company gave the company the right to connect with any railroad running in the same general direction, and, by a subsequent amendatory act, to consolidate its capital stock or its property, road, or franchise with those of any other railroad. Before the company exercised this right, the state legislature passed an act in 1881 inhibiting the consolidation, lease, or purchase by any railroad of the stock, property or franchise of any parallel or competing line. After the passage of this act, the company entered into an agreement with the holders of bonds of the Northern Pacific Railroad Company for the purchase of the property and franchises of the latter company. Pearsall, a stockholder of the Great Northern R.R., brought suit to enjoin enforcement of this agreement under the statute of 1881. Defendant company contended that the Act of 1881, if construed as plaintiff desired, would impair the obligation of his charter contract. The state court dismissed the bill, and plaintiff appealed to the United States Supreme Court. After quoting the language from Cooley hereinabove set out as to the distinction between vested and contingent interests, the Court held that a "bare unexecuted power to consolidate with other corporations, a power which, if it exists as claimed by the defendants, would authorize it to absorb by successive and gradual accretions the entire railway system of the country, is . . ., so long as it remains unexecuted, within the control of and subject to revaluation by the legislature. . . ."

Likewise, in the case at bar, all the appellant had was a bare unexecuted power (really, less than that since it

was also contingent on another event) in 1956 when the Public Service Commission Act was enacted. It should be noted, however, that in the Pearsall case it is difficult to ascertain whether the court is holding an unexecuted right to be a contingent right; or whether it is saying that the police power of the state more easily outweighs an unexecuted right ("But we think it was competent for the legislature, out of regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong.") It is probable that the court relied on both reasons, which suggests another and equally cogent ground for sustaining appellee's motion.

B. Police Power of the State.

It is well established that the police power of the state cannot be contracted away. *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. Ed. 1079; *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398, 78 L. Ed. 413 (1934), and a multitude of cases cited therein. In *Veix* v. *Sixth Ward Bldg. and Loan Assoc.*, 310 U.S. 31, 84 L. Ed. 1061 (1940), in affirming the dismissal of a suit against a building and loan association for the withdrawal value of shares on the ground that a subsequent statute restricting the right of withdrawal was a valid exercise of police power even though such statute might impair the obligations of contract, the court said:

> "In Home Bldg. & Loan Asso. v. Blaisdell this Court considered the authority retained by the state over contracts 'to safeguard the vital interests of its people.' The rule that all controls are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well."

And, finally, in *First New York Savings Bank* v. *Hahn*, 326 U.S. 229, 90 L. Ed. 34 (1945), the Supreme Court of the United States per Mr. Justice Frankfurter, used this language:

> "The Blaisdell case and decisions rendered since . . . yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the state to safeguard the vital interests of its people . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment. . . . A more candid statement is to recognize, as was said in Manigault v. Springs, *supra*, that the power 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the . . . general welfare of the people, and is paramount to any rights under contracts between individuals.' . . . Once we are in this domain of the reserve power of a state we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'"

C. Appellants' Contention That 7 U.S.C.A. 902 Prohibits Appellee Operating in a Municipality.

At pages 32 to 39 of their Jurisdictional Statement the appellants argue that under federal statutes the Administrator of REA was only authorized to make loans to appellee to construct lines in rural areas; that in some unstated way this limitation by the federal government on the right of its officer to make loans superseded the rights conferred on this appellee by its creator, the State of Mississippi, and became a limitation on the right of appellee to sell electricity in the disputed area after it was taken into a municipality.

The loan limitation in the federal statutes cited by appellants is a limitation on the Administrator of REA and not on this appellee; and, further, even as to the Administrator the limitation applies only as of the time that he made the loan. Even as to the Administrator a valid loan made by him and used to construct lines in a rural area does not become invalid years later because a Mississippi municipality expands its corporate limits to take in these lines.

Appellee is a Mississippi corporation and its right to operate is conferred and limited by Mississippi statutes. As stated by the Supreme Court of Mississippi in its opinion in the case at bar:

> "Delta (appellee here) is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, REc., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474(8)." (Appellant's Jurisdictional Statement Appendix 1-A p. A2)

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, T. Harvey Hedgepeth, one of the attorneys of record for Delta Electric Power Association, appellee in the above styled cause, and a member of the bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing motion to dismiss upon appellants and other interested persons in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office at Jackson, Mississippi, with first class postage prepaid, properly addressed, to each of the attorneys of record for appellant, Mississippi Power & Light Company, to-wit: Sherwood W. Wise, Electric Building, Jackson, Mississippi; Fred B. Smith, Ripley, Mississippi; Garner W. Green, Electric Building, Jackson, Mississippi; and Joshua Green, Electric Building, Jackson, Mississippi; and to Charles C. Jacobs, Jr., Commerce Building, Cleveland, Mississippi, attorney of record for Mississippi Municipal Association; and to E. W. Stennett, Barnett Building, Jackson Mississippi, attorney of record for City of Clinton, Mississippi; and to the following who were *Amici Curiae* in the Supreme Court of Mississippi: R. B. Deen, Jr., Dixie Towers, Meridian, Mississippi, attorney for East Mississippi Electric Power Association; Everette Truly, City Bank Building, Natchez, Mississippi, attorney for Southwest Mississippi Electric Power Association; A. A. Cohn, Panzica Building, Brookhaven, Mississippi, attorney of Magnolia Electric Power Association (and in view of his known death, to Henry Ware Hobbs, Jr., Panzica Building, Brookhaven, Mississippi, present attorney for Magnolia Electric Power Association); O. F. and J. O. Moss, Lucedale, Mississippi, attorneys for Singing River Electric Power Association; D. H. Waits, North Broad Street, Leland, Mississippi, attorney for Twin County

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This September ..... , 1963.

.....

T. HARVEY HEDGEPETH.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 403.

MISSISSIPPI POWER & LIGHT COMPANY, MISSISSIPPI MUNICIPAL ASSOCIATION, AND CITY OF CLINTON,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

MISSISSIPPI POWER & LIGHT COMPANY AND MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

BRIEF OF APPELLANT UPON MOTIONS OF APPELLEES TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 403.

MISSISSIPPI POWER & LIGHT COMPANY, MISSISSIPPI MUNICIPAL ASSOCIATION, AND CITY OF CLINTON,
Appellants,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

MISSISSIPPI POWER & LIGHT COMPANY AND MISSISSIPPI MUNICIPAL ASSOCIATION,
Appellants,

vs.

DELTA ELECTRIC POWER ASSOCIATION,
Appellee.

BRIEF OF APPELLANT UPON MOTIONS OF APPELLEES TO DISMISS

PRELIMINARY STATEMENT

Mississippi Power & Light Company, herein called "Appellant", appealed two similar cases to this Court (1) against Capital Electric Power Association, herein called

"Capital Association", and (2) against Delta Electric Power Association, herein called "Delta Association", and together called "Associations", or "Appellees". The opinions in these two cases are appended as Appendix "A" and Appendix "B" hereto; the pertinent provisions in the franchise and contract as Appendix "C"; and the Constitution and statutes applicable as Appendix "D".

Appellant filed its Jurisdictional Statement, wherein the constitutional questions are thus stated, Jurisdictional Statement, pp. 6-7:

> "I. Where a contractual franchise is duly granted by a municipality for twenty-five years to serve within *its boundaries* as they now are 'or may hereafter be laid out or extended' and the franchised utility performs the franchise and makes investments in facilities to render service in the disputed area, may the State of Mississippi by the Public Service Commission Act [hereinafter called 'Act'] impair the franchise contract by deleting 'as they * * * may hereafter be laid out or extended', when the municipality had express power to extend or contract its boundaries under the law of the State? * * *.
>
> "II. Where a contract is duly entered into by a municipality with an electric utility to furnish all street lighting service *required by the municipality*, may the State of Mississippi by the Public Service Commission Act impair the contract by holding it ineffectual in the disputed area during the contract period, despite the Contract Clause and the Fourteenth Amendment? * * *.
>
> "III. Notwithstanding the Contract Clause and the Due Process Clause of the Federal Constitution, could the Act, by Section 7716-05(b), Recompiled Mississippi Code of 1942, and the certificate made pursuant thereto by the Public Service Commission, confer upon Associations an exclusive electric franchise in the dis-

puted area and take from Appellant that participation expressly vouchsafed by the non-exclusive provision therein before the expiration of its franchise when, by Section 7716-38, Recompiled Mississippi Code of 1942, it was expressly provided:

> " 'Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts *nor the passage of this act* shall *affect* any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act.' "

"IV. Was there not a denial of procedural due process under the Federal Constitution, Fourteenth Amendment?

"V. By reason of Title 7, U.S.C., Ch. 31, Section 901, et seq., Ch. 432, Title I, Section 4, 49 Stat. 1365, as amended, and said loan to Associations, has Appellant justiciable rights against Association?" (Emphasis is ours, unless otherwise noted.)

Appellant therein filed its argument to sustain the jurisdiction of this Court, Jurisdictional Statement, pp. 13-25. This argument was served upon Appellees and, on September 21, 1963, they severally served elaborate Motions to Dismiss, under Rule 16. Apparently, Appellees admitted probable jurisdiction here when they assumed by their Motions to have dismissals, but sought no affirmances, as would normally be sought. Appellees severally predicated their Motions into two contentions: (a) that Appellant has no contractual grant constitutionally protected and (b) that the State's police power is paramount over any right Appellant may have.

Under the Jurisdictional Statement, Appellant presented an argument in the form of Appendix "8" and invited the Court's attention thereto, if it saw fit, to consider

the same. Now, when Appellees seek dismissals without affirmances in these Motions, it is requisite that Appellant reply to them in full, as Appellees have assumed *pro tanto* an active offensive against Appellant—substantially confessing and seeking to avoid.

I.

PLENARY POWER TO VOUCHSAFE FULL ENJOYMENT OF ITS FRANCHISE FROM 1948 THROUGH 1973 WITHIN THE MUNICIPALITY—i. e., AS IT WAS, AS IT IS AND AS IT WILL BE UNTIL 1973; AND APPELLANT MAY NOT BE EXCLUDED THEREFROM.

A.

As Used in the Franchise, the Term "Municipality", Included the Entire Municipality from 1948 Through 1973.

Had Appellant's franchise been granted directly by the Legislature, no such question could have arisen. *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666.

The State's relation to the municipality is peculiar. Herein the State has authorized the execution of the franchise covering the entire municipality between 1948 and 1973—twenty-five years—and it has likewise directly fixed the boundaries of the franchise but to be expanded or contracted by its agent under express delegated power thereasto as the public welfare required. It was necessary, obviously, that the City be empowered to expand its boundaries in order to provide municipal benefits to the growing population. The municipality became of that size essential for local self-government in 1959 and was under the

franchise lawfully expanded. In short, the municipality, as an agency of the State, has exercised (a) the power to grant the franchise and likewise (b) to extend its corporate limits during the period wherefor the franchise was. Being thus circumstanced, the State by Section 3375, *Recompiled Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*), empowered the municipality to contract and be contracted with in accordance with its discretion.

Note *Yazoo City* v. *Lightcap*, 82 Miss. 148, 33 So. 949, wherein it is said:

> "* * * 'The maxim that legislative power must not be delegated is to be understood in the light of the immemorial practice of this country and England, which has always recognized the policy and propriety of vesting in the municipal organization certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than central authority.' Cooley, Const. Lim., p. 140, note 118."

The word, "municipality", had been uniformly recognized throughout the judicial history of Mississippi as embracing the entire area within the corporate limits and such has been the interpretation nation-wide. Compare 37 *Am. Jur.*, "Municipal Corporation", Section 34, p. 651; 62 *C.J.S.*, "Municipal Corporations", Section 78, p. 186; *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 5, Sec. 1530, p. 129; *Pond on Public Utilities*, 4th Ed., Sec. 131, p. 316, *et seq.* But in the present franchise, to make express the implication, the words "now or hereafter" occur and occurring are conclusive; and, under the constitutional grant, this Court is the sole repository wherein this may be effectuated. With deference, the Mississippi Court can find no support for the exclusion of that which the contract

both expressly and impliedly contained. The phraseology meant, and still means, the entire area within the corporate boundaries of Winona from 1948 to 1973. Within those boundaries during that period, this non-exclusive franchise existed and was dominant. The fact that the State vested in the municipality, its agency, authority thus to contract was an implied obligation upon the part of the State that when a contract was thus made, it would be obligatory just as effectual as if the State had directly contracted. *Qui facit per alium facit per se.* 74 *C.J.S.* 4. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341.

To allow the principal to repudiate the act of the agent done under one grant in virtue of the fact that it had made two grants of power is basically dishonest, especially when the decisions of Mississippi's Court and this Court in *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 60 L. ed. 1102; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, hereinafter called "Crumpler Cases", had established validity expressly. Whether the State could thus play fast and loose with a contract, which was recognized as potent for three-fourths of a century, is that wherefor this Court has been created. However, the State has not made this contention, was not before the Court when it was adjudged and the sole protagonist is an association not in privity and impotent to challenge. Compare *Middleton* v. *Georgetown Mercantile Co.*, 117 Miss. 134, 77 So. 956.

With the utmost respect, it is incomprehensible that the Supreme Court of Mississippi that decided these cases is the same Court which so recently decided *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666. Therein that Court held that Section 5(e) of

the Public Service Commission Act (Chapter 372, *Mississippi Laws 1956*, as amended) was unconstitutional as applied to impose a 2% tax on the use of city streets by a telephone company because impairing a franchise contract in violation of Section 16 of the *Constitution of Mississippi*. We say "incomprehensible" because that decision relied on the following authorities, in part:

(a) Quoting 131 So.2d 673:

> "* * * Perhaps the leading case is Russell v. Sebastian, 1914, 233 U.S. 195, 34 S. Ct. 517, 521, 58 L. ed. 912. The issue was whether a gas company could lay *an extension* of its line in the City of Los Angeles under an 1879 constitutional section which gave the company the 'privilege' of using the streets. That provision was repealed by a 1911 constitutional amendment. The California court held the authority had terminated in 1911, but the United States Supreme Court reversed. The grant, resulting from an acceptance of the state's offer, *constituted a contract*, and vested in the company a property right protected by the contract clause. With reference to the extent of the grant, *the actual user did not measure it*. When accepted and acted upon, it became binding *as an entirety*, 'not foot by foot, as pipes were laid.' The offer as made was accepted as an entirety, and not PRO TANTO." (Capital emphasis by the Court).

We direct special attention to the italicized portions of this Court's opinion. In the *Sebastian* case it is said (58 L. ed. 923):

> "In view of the nature of the undertaking in contemplation, and of the terms of the offer we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance PRO TANTO. We think that the offer was intended to be accepted *in its entirety as made*, and that acceptance lay in conduct committing the person accepting to the described

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service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted. City R. Co. v. Citizens' Street R. Co., 166 U.S. 557, 568, 41 L. ed. 1114, 1118, 17 Sup. Ct. Rep. 653; Grand Trunk Western R. Co. v. South Bend, supra. In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city.

"This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the state's grant should assume. The service, as has been said, was a community service. Incident to the undertaking in response to the state's offer was the obligation to provide facilities that were reasonably adequate. Lumbard v. Stearns, 4 Cush. 460; Cumberland Teleph. & Teleg. Co. v. Kelly, 87 C.C.A. 268, 160 Fed. 316, 324, 15 Ann. Cas. 1210; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U.S. 1, 27, 51 L. ed. 933, 945, 27 Sup. Ct. Rep. 585, 11 Ann. Cas. 398; People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N.Y. 528, 533, 47 N.E. 787; Morawetz, Priv. Corp., § 1129. It would not be said that either a water company or a gas company, establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community. *But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative.*

"In People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N.Y. 528, 533, 47 N.E. 787 (approved in Illinois C. R. Co. v. Chicago, 176 U.S. 646, 666, 44 L. ed. 622, 629, 20 Sup. Ct. Rep. 509), a grant of authority to lay conduits for conveying gas through the streets of a town, so as to render service to the people of the

town, was held to extend as a property right *not only to the streets then existing, but to those subsequently opened.* The court said: 'It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposed an obligation upon the corporation to serve the public in a reasonable way. The relator is bound to supply gas to the people of the town upon certain conditions and under certain circumstances, and it would be most unjust to give such a construction to the consent as to disable it from performing its obligations. It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, *such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old.*'"

Note also *Illinois Central Railroad Co.* v. *Chicago*, 176 U.S. 646, 44 L. ed. 622, 629, 20 S. Ct. 509, also approved in the *Sebastian* case.

(b) *Pacific Telephone & Telegraph Co.* v. *City of Los Angeles*, 44 Cal.2d 272, 282 P.2d 36, held that the franchise contemplated "new streets to be opened and old ones lengthened as undeveloped areas became settled." The sixth syllabus is as follows:

"[6a, 6b] * * * Grant of state franchise to use highways and other public places in operating telephone system necessarily contemplates that new streets will be opened and old ones lengthened as undeveloped areas become settled, and *such franchise*

rights extend to areas where there have been no streets or telephone service PRIOR TO ANNEXTION OF SUCH AREAS to city having charter power to regulate use of its streets for telephone purposes."

(c) *City of Owensboro* v. *Cumberland T. & T. Co.*, 230 U.S. 58, 33 S. Ct. 988, 57 L. ed. 1389, held that "The municipal ordinance was an offer accepted by the telephone company, and became a contract constituting an unimpairable right", 131 So.2d 673. And this case upheld as inviolable that franchise despite the clause therein:

"Sec. 6. This ordinance may be altered or amended as the necessities of the city may demand."

(d) *City of Louisville* v. *Cumberland T. & T. Co.*, 224 U.S. 649, 663-664, 32 S. Ct. 572, 56 L. ed. 934, is to the same effect as the *Owensboro* case and approves *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N.Y. 528, 47 N.E. 787.

(e) *Grand Trunk Western Railway Co.* v. *City of South Bend*, 257 U.S. 544, 57 L. ed. 633, 33 S. Ct. 303, holds that a municipal franchise to build a street railway "* * * was single and specific; and when accepted and acted upon became binding—not foot by foot, as the rails were laid, but as an entirety". Likewise, the Winona franchise and lighting contracts were made and accepted as an entirety, for the entire town.

(f) *Traverse City* v. *Consumers Power Co.*, 1954, 340 Mich. 85, 64 N.W.2d 894, follows both the *Sebastian Case* and the *Deehan Case*.

(g) *City of Seattle* v. *Western Union Telegraph Co.*, 1944, 21 Wash.2d 838, 153 P.2d 859, approved the *Sebastian Case* and in its 8th syllabus holds:

"The State's statutory grant to telegraph company of right to operate, construct and maintain its

> lines along public highways or streets without compensation included not only * * * its lines on streets of city occupied by company at time of passage of act, but also on such additional streets as might be necessary in furnishing public service for which company was formed * * *."

We cannot refrain from citing still other authorities which might have been cited by that Court in the *Meridian Case*, all announcing the general rule that a municipality has the power to grant a franchise to use its streets within its current boundaries and as the same may be thereafter extended, such a franchise being constitutionally inviolable:

(a) *Tulsa St. Ry. Co.* v. *Oklahoma Union Traction Co.*, 27 Okla. 339, 113 Pac. 180, follows the *Deehan Case*.

(b) *Seattle Lighting Co.* v. *City of Seattle*, 54 Wash. 9, 102 Pac. 767, follows the *Deehan Case*.

These authorities demonstrate, we respectfully submit, that that Court erred in trying to evade the impairment-of-obligations clause by *raising up a phantom limitation upon the power of each of the municipalities of this state; every city must be able to legislate and to contract throughout its entire boundaries, however they may be expanded or contracted.*

In this regard, this same rule applies even where a municipality is abolished and its area and people, with some excisions or annexations, are reconstituted into a new municipality. *Broughton* v. *Pensacola*, 93 U.S. 266, 23 L. ed. 896 (followed in *Ross* v. *Wimberly*, 60 Miss. 345); *Shapleigh* v. *San Angelo*, 167 U.S. 646, 653, 654, 42 L. ed. 310; *Mobile* v. *Watson*, 116 U.S. 289, 29 L. ed. 620; *Mount Pleasant* v. *Beckwith*, 100 U.S. 514, 25 L. ed. 699; and *Vilas* v. *Manilla*, 220 U.S. 345, 55 L. ed. 491. If the abolition

of a municipality and the reconstitution of its area and annexed area does not abolish a franchise, how can mere annexation do so?

It is, therefore, respectfully suggested that, by this decision—in addition to announcing the implied repeal of numerous time-honored statutes giving municipalities full jurisdiction of their streets—that Court has impliedly overruled *Southern Bell Telephone & Telegraph Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666, and cast grave doubts on *Ross* v. *Wimberly*, 60 Miss. 345. And yet where is the authority for such an upheaval? It is respectfully and earnestly urged that there is none and that no justification exists either in law or in logic for thus departing from the thorough and excellent decision in *Southern Bell Telephone & Telegraph Co.* v. *City of Meridian, supra*, and circumventing the Constitutions.

B.

The Contract Was Validly Granted by the State of Mississippi under Plenary Authority Therefor Precedently Vouchsafed to the State's Agency.

The authorization given by the State, whereunder this contract was made, provides, Section 3375, *Mississippi Code of 1942* (now Section 3374-02, *Recompiled Mississippi Code of 1942*):

> "* * * And such municipality may contract and be contracted with and exercise and perform all municipal powers and duties."

Such franchise had to be non-exclusive and this one was, for twenty-five years. The State on the 23rd day of February, 1948, prescribed the then boundaries of Winona as that wherein the franchise would be, but for the public welfare expressly provided by Section 3376, *Mississippi*

Code of 1942, (now Section 3374-10, *Recompiled Mississippi Code of 1942*) that that which now was might be extended or contracted, compare *In the Matter of the Enlargement of the Municipal Boundaries of the City of Forest, Mississippi*, ____ Miss. ____, 153 So.2d 688; and when the State thus did, our franchise but repeated that specifically binding. This question is not *res nova*, but rests upon statutes whose verbiage was validly adjudicated seventy-five years ago. *Henry* v. *Henderson*, 103 Miss. 48, 60 So. 33. As said by Mr. Justice Shiras in *Vicksburg Waterworks* v. *Vicksburg*, 185 U.S. 65, 69, 46 L. ed. 808, 811:

> "By an act of the legislature of the State of Mississippi, approved on the 18th day of March, 1886, the city of Vicksburg was authorized 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, *and to that end to contract with a party or parties who shall build and operate waterworks*'."

Pursuant to this power the Mayor and Board of Aldermen passed the ordinance quoted in 185 U.S. 65, 69, 76, 46 L. ed. 808, 811, 813:

> " 'Sec. 1. That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining, and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares, *and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction*, * * *.'
>
> * * *

> " 'Sec. 13. The said Samuel R. Bullock & Company, their associates, successors, or assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of pipes and general operation of the works, and to make such rates and charges for the use of said water, as they may determine; provided, that said rates and charges shall not exceed 50 cents for each 1,000 gallons of water.' "

In *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, applied and approved by this Court in *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, the power of the State, through Jackson, was thus declared by Mr. Justice Cooper, p. 643:

> "In view of the nature and character of the subject-matter of the contract which the board of mayor and aldermen of the city of Jackson was authorized to make by the third section of the act of February 29, 1888, we think the contract entered into with the appellant was within the delegation of power, so far as the time of its duration is involved. The language of the act is 'that the board of mayor and aldermen be, and they are hereby, authorized and empowered to contract with any reliable corporation, association or individual, for supplying the said city of Jackson with water and electric or gas lights, from year to year, * * *.' "

See *Meridian Waterworks* v. *City of Meridian*, 85 Miss. 515, 37 So. 927.

Mississippi's Court had decided *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771, in 1895, and had further decided *Reid* v. *Trowbridge*, 78 Miss 542, 29 So. 167, in 1900, and in the *Trowbridge Case*, involving this specific "now or hereafter" clause, no attack was made in this aspect. To make assurance doubly sure, this Court then decided *Vicksburg* v. *Vicksburg Waterworks Co.*, 202

U.S. 453, 50 L. ed. 1102, whereunder the same "now or hereafter" provision was before the Court and not challenged. Then came *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155, where the same franchise was involved with the "now or hereafter" clause incorporated, and this Court found naught therein objectionable for very possibly the then counsel thought it had been, as we respectfully submit it had been, ultimately determined that when the State, acting through the Legislature, had employed the municipality as a governmental instrumentality to contract without qualification, normal contracts, then usual and customary, when made, were inviolate. Note that said, 206 U.S. 515:

> "In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, fixing a maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years; and, in the absence of a showing of unreasonableness 'so gross', as the court of Mississippi has said, 'as to strongly suggest fraud or corruption', this action of the council is binding and for the time limited puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party.
>
> "While we, therefore, reach the conclusion that the former case did not adjudicate the matter, we think the contract in this respect was within the power of the council, and cannot be violated consistently with the contract rights of the company by the subsequent ordinances of the city."

This Court must construe the authority delegated. The State, beginning with the Vicksburg statute, gave its agency

the power to contract within certain guide lines; but it made by legislative fiat the action of the municipality conclusive as to its boundaries, whether they remained stationary or were to be expanded. Furthermore, this Court recently in *Arizona* v. *California*, ... U.S. ....., 10 L. ed. 2d 542, when speaking of a similar grant of power, said, p. 566:

> "* * * The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it. * * *."

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 533, 48 L. ed. 1102, 1107:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

When the State saw fit, with qualifications not here relevant, to vest power to contract in the municipalities and pursuant thereto the municipality, acting for the State, did contract, the Contract Clause came into play. Compare *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155.

In *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204, Wisconsin assumed to transfer ordinance contracts into indeterminate certificates with-

cut the contractee's consent. This Court thereasto said, p. 137:

> "The integrity of contracts—matter of high public concern—is guaranteed against action like that here disclosed by §10, art. 1, of the Federal Constitution: 'No state shall . . . pass any . . . law impairing the obligation of contracts.' It was beyond the competency of the legislature to substitute an 'indeterminate permit' for rights acquired under a very clear contract. Vicksburg v. Vicksburg Waterworks Co. 206 U.S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; Detroit United R. Co. v. Michigan, 242 U.S. 238, 253, 61 L. ed. 268, 275. P.U.R. 1917B, 1010, 37 Sup. Ct. Rep. 87. The erroneous conclusion concerning this Federal question led to the decree below. * * *."

Cleveland v. *Cleveland City R. Co.*, 194 U.S. 517, 48 L. ed. 1102; *Detroit United R. Co.* v. *Michigan*, 242 U.S. 238, 61 L. ed. 268.

With the utmost deference to Mississippi's Court, they stress the fact that on March 29, 1956, there had not been made the addition of Area "B" to Winona as at now and, therefore, that in virtue of that action not having been taken, the Legislature, who gave the entire area, was privileged to split it as against the donee who was entitled to the unity so soon as the Mayor and Board of Aldermen had exercised the power vested under Section 3376, *Mississippi Code of 1942* (now Section 3374-10, *Recompiled Mississippi Code of 1942*). That power has been exercised. That which the Mississippi Court assumes to do is to place the Act, as at March 29, 1956, *in vacuo* and to tear out of the contract that which the Legislature had specifically directed and the parties had agreed upon, that when additions were made that they would be within the municipal limits and that thereover Appellant would possess that contracted for. We start with "now" (the limits on Feb-

ruary 23, 1948, Area "A"), and then the limits on the extension, November 3, 1959, Area "B"; and that which Mississippi's Court, with deference, has not dared to deny is that in good faith under existing decisions the contract of 1948 was made. We apply the maxim, "Qui facit per alium facit per se", *Broom's Legal Maxims*, p. 818. Three-under the State must be just to Appellant before it can be generous to Appellee. Section 3376, *Mississippi Code of 1942*, and the express provision of the franchise provided that Area "B" should be irrevocably under the contract upon November 3, 1959. The State could not legislate herself from this obligation effective until February 22, 1973. If it were possible for the State then to give that which it initially had the power to give, the Appellant has those rights which we have asserted. Suppose the franchise had specifically provided that instead of "hereafter", "on November 3, 1959, and on and after this date", the State had conferred on Area "B" of the City that requisite to make of the city a unity and to prevent second class citizens therein. Compare *Gomillion* v. *Lightfoot*, 362 U.S. 339, 5 L. ed. 2d 110, citing *Mobile* v. *Watson*, 116 U.S. 289, 29 L. ed. 620, and *Graham* v. *Folsom*, 200 U.S. 248, 50 L. ed. 464.

Thus the State having authorized Winona as at the 23rd day of February, 1948, to grant a franchise throughout the city as it then was and Appellant having contracted under the future planning now essential thus to do, the Legislature having given by contract the entire city, may not sever the contract in Area "B" and donate to the Appellees. Appellant is perfectly willing for Appellee to have that which the State could lawfully donate after Appellant's rights hereinabove quoted specifically were conserved.

C.

But If Therein We Err, Then the State Never Having So Intended Wrought Complete Rectification by Section 7716-38, Recompiled Mississippi Code of 1942.

Section 7716-38, *Recompiled Mississippi Code of 1942*. provides:

> "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

The *Crumpler Cases, supra,* demonstrating the contract validity under the impairment clause of the Constitution precluded any other construction than that wherefore we contend—the municipality embraced the entire area within its bounds from 1948 to 1973, twenty-five years, both impliedly by using the word "municipality" and expressly by adding thereto the words, "now or hereafter".

The Act, instead of taking away Appellant's rights, confirms them, in this, that Section 7716-05(b), alleged to have been emasculated, is but a general provision and there is therein the last provision, Section 7716-38.

Admitting, as we most surely do not, that this Court and the Mississippi Court will determine *contra* to that said in (a), then surely let it be noted that Section 7716-05(b), whereunder the Commission and Mississippi's Court ousted Appellant from its constitutional rights and condemned it to desist from profitable operation in Area "B", is but a part of the Act and that the last section in the Act specifically thus provides, Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

In *United States* v. *Heinszen*, 206 U.S. 370, 382, 51 L. ed. 1098, 1102, this Court said:

"That where an agent, without precedent authority, has exercised, in the name of a principal, a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement. That the power of ratification as to matters within their authority may be exercised by Congress, state governments, or municipal corporations, is also elementary. * * *

"* * * * * * If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and (the power) to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the Maxim, *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*. Under the Constitution Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.'"

Quoting from *Mattingly* v. *District of Columbia,* 97 U.S. 687, 24 L. ed. 1098, 1099. See also *Vaughan* v. *Swayzie,* 56 Miss. 704. Appellant must have a dominant franchise throughout the municipality.

In this cause the Appellees were sole complainants and the State was not a party, as such, in either cause, nor subject to suit. Winona was never a party so that the decrees herein are as between the Appellees, Associations, and Appellant, the Power Company, *res judicata;* but as between the Appellant, the State and Winona *res inter alios acta;* and as to the State a nullity. *Chase National Bank* v. *Norwalk,* 291 U.S. 431, 78 L. ed. 894; *Hansberry* v. *Lee,* 311 U.S. 32, 85 L. ed. 22.

This Court in *Arizona* v. *California,* ..... U.S. ....., 19 L. ed. 2d 542, had in mind certain appropriations that were beyond the apportioning power of the Secretary of the Interior, and therein quoted as apposite the statute. Footnote 87, p. 569:

> "87. 'Nothing . . . in (this Act) shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing . . . (herein) shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.' 43 USC §383 (1958)."

Compare *Head* v. *Board of Examiners,* ..... U.S. ....., 10 L. ed. 2d 983, Opinion, Mr. Justice Brennan, pp. 990, 996.

Note the Act contains the provision as to the certificate of convenience and necessity, Section 7716-05(b), and

at the same time, passed as a unit, it contains Section 7716-38. These two sections, inseparably integrated, must be judicially determined, *Coker* v. *Wilkinson*, 142 Miss. 1, 106 So. 886, and if absolutely irreconcilable, the Court said, p. 887:

> "* * * and that the latter clause being in conflict with the former and being the last expression of the Legislature on the subject, must stand and the former go down under the principle of law that, where there are two conflicting provisions in the same statute, the last expression of the Legislature must prevail over the former. Undoubtedly that principle of statutory construction is sound. * * *."

Craig v. *Walker*, 191 Miss. 424, 2 So. 2d 806; 50 *Am. Jur.*, "Statutes", Section 365, p. 370; *Inglehart* v. *Inglehart*, 204 U.S. 478, 51 L. ed. 575; and supplementally, this Court said in *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208, 76 L. ed. 704, 708:

> "* * * General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. United States v. Chase, 135 U.S. 255, 260, 34 L. ed. 117, 119, 10 S. Ct. 756, 8 Am. Crim. Rep. 649. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. * * *. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. * * *."

Approved in *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 6 L. ed. 2d 72, 76.

Basically under the prior decisions here and in Mississippi, Appellant had contractual rights. When in 1956, this legislation was before the Legislature, the utilities were not either dead or dumb. They realized what was

upon them and that they must protect themselves as to their franchise under the Contract Clause; and that they so thus did, those here signing can as of knowledge state, and the terms of the Act so show. This protection is found in Section 7716-38. This Act recognizes that there may be utilities within the same municipality, but this section is a specific section, which, under settled law, constitutes an exception to the prior general provisions and as such makes this section the crux of this case:

> (1) "Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, * * *."

But under the decisions of this Court and the Supreme Court of Mississippi, there was thereasto a contract, unimpairable, and when repeal by the State is attempted of a provision of a contract, so that there will be an impairment, that done by the State is a nullity. *Louisiana* v. *Pilsbury*, 105 U.S. 278, 301, 26 L. ed. 1090, 1098, wherein it is said:

> "The case of Von Hoffman v. Quincy, reported in 4th Wallace, 535 (71 U.S., XVIII., 403), is a leading one on this subject. The court there said: 'That when a State has authorized a municipal corporation to contract, and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound.'"

It is true, however, that Mississippi's Court did say, *Delta Electric Power Association* v. *Mississippi Power & Light Company*, Miss. ....., 149 So.2d 504, 513:

> "All of these statutes must be read together, and in the light of subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, *the Act modifies them*. * * *."

With deference, we defend our Court against the accusation that it was there assuming to act in contravention of the Contract Clause. It knew better and has revered that Clause. *Yazoo & M.V. R. Co.* v. *Adams*, 90 Miss. 559, 45 So. 91; *Wisconsin Lbr. Co.* v. *State*, 97 Miss. 571, 54 So. 247. And if this so be, then potentially reversal must be had with a remand to Mississippi's Court to delimit the State's interpretation of this statute, *Metlakatla Indian Community* v. *Egan*, 363 U.S. 555, 4 L. ed. 2d 1397, so that if essential this Court may see clearly to pluck out the mote.

> (2) "* * * but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, * * *."

It is perfectly obvious that these utilities in Mississippi with their monies invested, were vitally interested in the passage of this Act, and, with deference, saw no impairment therein or thereby under the nonexclusive contract of electric service within the municipality as it from time to time might be changed as to boundaries under the reserved power in *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; and *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. ed. 2d 110. Note that the Legislature diligently considered the matter as Mississippi's Court said and when they so did used in this section "repeal" and "passage", so as that there would be no possible contention, with deference, such as Mississippi's Court has assumed to raise up.

The first provision says that "neither the repeal of any such acts * * * shall affect any act done, or any cause of action, whether in litigation or otherwise". Appellant was thoroughly conversant with that which began with Vicksburg and continued down until the passage of this

Act and it will not be challenged by anyone that had it been dreamed that the effect of this Act was to impair the obligation of every franchise, every all-requirements contract, in every municipality in the State, there would have been the most violent protest at unsettling by impairment the basic conceptions that had persisted for nearly three-quarters of a century. The Court will see that the Legislature, notwithstanding the repeal of any act in conflict, then went further and stated that such repeal should not "affect any act done, or cause of action, whether in litigation or otherwise". This is extraordinary, but more extraordinary is the further declaration, "or any rights accruing, accrued or established prior to the effective date of this act". In *Arizona* v. *California*, ... U.S. ....., 10 L. ed. 2d 542, 553, this Court said:

> "* * * Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short-hand expression of this legal principle * * *"

"Qui prior est tempore, potior est jure", *Broom's Legal Maxims*, p. 362; 51 *C.J.* 297. Thus with the valid acceptance and erection of the facilities the State lost its potency to impair.

Note the further declaration "nor the passage of this act shall affect any act done or any cause of action, whether in litigation or otherwise". The pronoun "this" is all-inclusive and embraces every provision of the Act from its title to its approval. With deference, this language falls squarely within the reasoning of Mr. Justice Black in *United States* v. *Braverman*, ... U.S. ....., 10 L. ed. 2d 444; and any impairment of that specifically granted to the Appellant was as effectually condemned as

was the rebate under the Interstate Commerce Act. It is essential, with deference, when the Legislature thus speaks, that the courts vouchsafe protection to those who have acted upon grants made by the State through the same appropriate words, as have been respected from time out of mind.

(3) Note, finally, Section 7716-38:

> "* * * or any rights accruing, accrued or established prior to the effective date of this act."

In 30 *C.J.S.* 1232, "Established" is thus defined:

> "* * * made definitely certain, settled unalterably, or made final beyond question or dispute in so far as any question can be settled in a court proceeding; purchased."

Wells Lamont Corporation v. *Bowles*, App., 149 F.2d 364, 366, certiorari denied, 326 U.S. 730, 90 L. ed. 434; *District of Columbia* v. *Fleming*, C.A., D.C., 217 F.2d 18; *Walling* v. *Fred Wolferman, Inc.*, D.C. Mo., 54 F. Supp. 917.

Note further the words "any rights accruing, accrued". *United States* v. *Lindsay*, 346 U.S. 568, 98 L. ed. 300, 304. As at the date of the passage of the Act, all of the rights under this franchise to that moment are conceded to have existed, and but for the Act could have been enjoyed. Now, with this fixation of these rights accrued to the moment of the passage of this Act, the Legislature went further and used the participle "accruing"—rights accruing. Unquestionably, the contract franchise "hereafter" falls definitely within that term. *Spring City F. Co.* v. *Commissioner of Internal Revenue*, 292 U.S. 182, 78 L. ed. 1200, 1203; see, especially, *H. Liebes & Co.* v. *Commissioner of Internal Revenue*, C.A. 9, 90 F.2d 932, reviewing cases. See also *Grenada Bank* v. *Petty*, 174 Miss.

415, 164 So. 316; *United States* v. *St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 70 L. ed. 435; *Fullerton-Krueger Lbr. Co.* v. *Northern Pac. R. Co.*, 266 U.S. 435, 69 L. ed. 367; *United States* v. *Munro-Van Helms Co.*, C.A. 5, 243 F.2d 10, 12; 1 *C.J.S.*, "Accrue", p. 759.

Hereasto, that submitted certainly demands the exercise of the exclusive jurisdiction, especially because there being a contract, the State Legislature, under the holding of the Court, here divided the contract into two parts, leaving Appellant to be bound by and perform *qua* Area "A" and divested even a pretense of a right in Area "B"; and thereasto, substantially, with deference, so adjudged as that if Appellant passed over Appellee's Area "B" to perfect its electric connections, there would be a law violation. That demanded is as large a charter as the winds require within Winona until February 22, 1973; but *arguendo* that the Court should hold that naught has been said of sufficient moment to require a hearing on the merits and to that extent we stand defeated, yet like the village schoolmaster, we can argue still, and, with deference, accurately.

D.

But If We Err in the Foregoing, with Deference, This Court Must under the Implied and Express Terms of the Statutes and Franchise Vouchsafe an Interpretation Whereby Appellant Had a Valid Contract Within the Boundaries of the Municipalities As They Were, Are, and Are Yet to Be.

An appropriate construction of Section 7716-05(b) is to be had whereby serious constitutional questions may be avoided, *United States* v. *Witkovich*, 353 U.S. 194, 1 L. ed. 2d 765; and Section 7716-05(b), on its face, related

exclusively to the future with Appellant's franchise dominant.

Section 7716-05 and Section 7716-05(b) of the Act definitely and expressly provide:

> "No person shall construct, acquire, extend or operate equipment for * * * generating, transmitting or distributing * * * electricity, * * *, for any intrastate sale, to or for the public for compensation, * * * without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.
>
> * * *
>
> "(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or *operation then being conducted*, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; * * *."

Basically, these two sections must be construed by this Court so far as the Contract Clause is alleged to be impaired. *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102. In construing the franchise possessed by Appellant hereinabove quoted in full, this Court must so construe this section of this Act, forgetting for the moment Section 7716-38, so as to make Appellant's the dominant franchise and Appellee's rights servient thereto. The admeasurement of these rights need not be herein made, not being at issue. Confessedly the cases of *Light, Heat & Water Company* v. *Jackson*, 73 Miss. 598, 19 So. 771; *Reid* v. *Trowbridge*, 78 Miss. 542, 29 So. 167; and

Griffith v. *Vicksburg Waterworks Co.*, 88 Miss. 371, 40 So. 1011, had been determined by the Supreme Court of Mississippi, and each of them had approved the grant made by the municipal boards under the authority of the State. *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 51 L. ed. 1155. Insofar as this Court went it assumed to regulate rates throughout the area under Section 13 of the ordinance, both as it was when the grant was made and potentially after Vicksburg was in process of expanding. Appellant's system at Winona was owned and operated and the right thus to do was vouchsafed constitutionally until 1973. Appellant's contract to that extent has not been questioned by the State, *qua* State, or by Winona, and Appellee has no justiciable rights as to the areas not certificated to it. Grants by the State to Appellee, as well as to all other persons, are to be strictly construed in favor of the grantor. In *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 469, 50 L. ed. 1102, 1111, this Court said:

> "In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that, where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the waterworks company during the period of this contract, it cannot be held to have done so by mere implication. * * *."

Citing *Knoxville Water Co.* v. *Knoxville*, 200 U.S. 22, 50 L. ed. 353.

As to the power of the Legislature to superimpose upon Appellant and its franchise rights a provision for an

indeterminate future franchise, this Court has specifically made denial. *Superior Water, Light & Power Co.* v. *Superior*, 263 U.S. 125, 68 L. ed. 204. The right of the State to amend Appellant's contract had to be specifically reserved. *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389. As to the franchise being at all times co-extensive with the municipal boundaries, the law itself thus did under Section 3374-10; and, with the utmost deference, the Supreme Court of Mississippi completely missed the road laid down by this Court and all other Courts that when the boundaries of a municipality are extended or contracted and provision so made as that the State may legislate, all obligations are contemporaneously citywide, especially when so made as is herein done by explicit provision. Section 3374-10. Compare 37 *Am. Jur.*, "Municipal Corporation", Section 34, p. 651; 62 *C.J.S.*, "Municipal Corporations", Section 78, p. 186; *McQuillin, Municipal Corporations*, 3rd Ed., Vol. 5, Sec. 1530, p. 129; *Pond on Public Utilities*, 4th Ed., Sec. 131, p. 316, *et seq.*

These authorities recognize, with deference (a) "Modus et conventio vincunt legem", Broom's Legal Maxims, p. 689, and that the Contract Clause exists and (b) that in the statutes "municipality" is synonymous with and must be read to include, unless prohibited, expansions and contractions. Such expansions or contractions are operative (a) *eo instanti* when made and (b) *proprio vigore* under the statutes. In certain decisions, this is exemplified thus, 13 *Am. & Eng. Anno. Cases* 137:

> "A municipality has power to contract by ordinance that a franchise granted shall be in force in the corporate limits of the city as they exist at the time of the passage of the ordinance or as they may thereafter be enlarged, for, if the ordinance were silent as to the territory thereafter taken into the city, the

meaning would be the same. Truesdale v. Newport, (Ky.) 90 S.W. 589."

So our respectful submission is that this Court must for itself determine whether the offer to contract with the State through its municipality, when accepted, became a contract binding the State as well as the municipality up to the boundaries as they exist from day to day. That the State acted through the municipality in no wise diminished the obligatory effect of the contract. *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. ed. 341. Under *Yazoo City* v. *Lightcap*, 82 Miss. 148, 33 So. 949, Mississippi's Court recognized the propriety of allowing each municipality to contract so as to best promote its particular welfare—especially the future planning. Naught reasonably and appropriately granted to Appellee may be so construed as to oust Appellant from an area which, under settled law for three-quarters of a century, has been validly subject to legislation through the municipal agency when, as here, appositely delegated and appropriately ratified, to say nothing of the impropriety of Mississippi's Court taking Area "B" of the municipality and giving it gratuitously, and possibly contrary to Section 95, *Mississippi Constitution*, to Appellee. Thereasto in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 702, 4 L. ed. 629, 675, Mr. Justice Story declared:

> "* * * This question cannot be answered in the affirmative until it is established, that the legislature may lawfully take the property of A and give it to B; * * *."

This litigation was most violent and involved many other issues, one of which took away from the municipalities the rich revenues potentially realizable through sale of the franchise.

Our submission is that under this jurisdictional statement, the basic contract provisions quoted hereinabove are valid as granted, but if perchance not so, then ratified specifically; and again, if perchance not so, then *per se* did not authorize the Commission to take from Appellant that which was its own and vest it in another gratuitously.

Conclusion.

As to the State Court's construction that the two municipalities, as a whole, from 1948 to 1973 do not embrace all of their parts, it is so fundamentally specious as to demand rectification, especially when:

(1) The State is not a party and has not been herein; and the construction by Mississippi's Court at the behest of the Associations contravenes the construction of precisely similar contract provisions in the decisions in the *Crumpler Cases* in this Court, as well as the Mississippi decisions on which the *Crumper* decisions were predicated.

(2) The legislative intent was not to impair that to Appellant rightly belonging or to give it to Appellees, the Contract Clause preventing (Section 7716-38, *Recompiled Mississippi Code of 1942*).

II.

THE POLICE POWER COULD NOT IMPAIR THE SPECIFIC GRANT WITHIN THE MUNICIPALITY.

(a) The Act did not pretend so to do. With deference, we defend the Legislature against an intention to impair—*per contra*, as indicated in I, *supra*, the Legislature, if it were essential, has validated; and, therefore, no such question arises.

(b) Assuming there is such question, then the police power is not adequate therefor and the line of demarcation

between the contract and the police power is a Federal question that must be solved here. This Court alone can thus sever and divide the Federal from the State authority; and, in dividing, it must admeasure the exigencies which require the impairment and mark the line whereat the contract becomes void. *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 78 L. ed. 413. This Court must now do precisely what it did when it decided the case of *Veix* v. *Sixth Ward Building & Loan Association*, 310 U.S. 31, 84 L. ed. 1061, and differentiated *Treigle* v. *Acme Homestead Association*, 297 U.S. 189, 80 L. ed. 575. And just as that differentiation gave jurisdiction, so does that now herein demanded. See *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. ed. 1079.

Mississippi's Court cited only the case of *Superior Oil Company* v. *Foote*, 214 Miss. 857, 59 So.2d 844 (1952), which concerned only unitization of fugacious hydrocarbons. It is quite inapposite. Mississippi's Court did not dream of the police power preventing, when it declared valid the Telephone Company's rights. *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666 (decided after the District Court, the Court of Appeals and this Court had cleared the way therefor: 154 F. Supp. 736, affirmed 256 F.2d 83, vacated 358 U.S. 639, 3 L. ed. 2d 562), and the power to tax being quite analogous and substantially equivalent to the police power.

When, therefore, Appellees argue that Appellant's contract is impairable despite the Contract Clause, the higher rights of the people demand that this Court assign the reason why the State power—police power—supersedes the constitutional prohibition. In the *Crumpler Cases*, *supra*, this Court assumed jurisdiction and maintained precisely similar contracts under the supremacy of the Constitution. Has that instrument now lost its supremacy?

If there be this contract clause and, if it is to be impaired under the police power, this Court alone can so declare; and it is absolutely requisite that it lay down the ground rules. Frankly, we cannot find any decisions so allowing. The nearest approach is *Superior Water, Light & Power Co.* v. *City of Superior*, 263 U.S. 125, 68 L. ed. 204.

Therefore, when Appellees admit the contract as protected by the Contract Clause and the right is claimed, not by the State, but by an instrumentality of the Federal government, it is imperative that this Court act. See Point IV, *infra*, and Point V in the Jurisdictional Statement.

If the police power hereasto be apposite, then, with deference, the Constitution hath lost its savor and is fit only to be trampled under foot. We reiterate, Appellees have not taken issue with the authorities in our Jurisdictional Statement; but have, taking the offensive, assumed to confess and avoid—therein, with deference, they have not overcome.

III.

DIFFERENTIATION OF APPELLEES' AUTHORITIES INCLUSIVE OF BOTH (A) THE ALLEGED WANT OF POWER AND (B) THE POLICE POWER.

We reiterate, with deference, our Jurisdictional Statement and the arguments therein, which we respectfully submit have not been answered, and ask the Court to consider it in connection with Appellees' authorities. Especially do we call attention to the failure of Appellees to indicate the extent of the State's power—the relation between the State and its agency, the municipality. For seventy-five years the word "municipality" has covered in these franchises the boundaries as was, as is, and as is

to be, until termination. The *Crumpler decisions*, as well as the Mississippi cases cited, have specifically held under grants no broader than those under which these municipalities acted, that municipal boundaries, even if extended, admeasured for thirty years the franchise contract. Such a construction is absolutely requisite to protect the jurisdiction of a city wherein there is continuous change and growth and the necessity for additional income obtainable from franchise sales which have been imperilled by these decisions. The Legislature made express provision for this change and growth by vesting the municipality, as its agent, with power to expand.

A. Delta Association's authorities:

1. *Lynch* v. *United States*, 292 U.S. 571, 78 L. ed. 1434 (Motion p. 5). Unquestionably, counsel's quotation is correct, but counsel overlooks the Mississippi cases holding, since *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629, that appellant had a contract. Note the further declaration in the *Lynch Case*, 292 U.S. 580, 78 L. ed. 1441:

> "* * * But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditures, would be not the practice of economy, but an act of repudiation. * * *."

Note the approval of our contention in *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 241 Miss. 678, 131 So.2d 666. There it was not even suggested that such a power existed. On the contrary, note the approval of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Vicksburg* v. *Vicksburg Waterworks Co.*, 202 U.S. 453, 50 L. ed. 1102, a *Crumpler decision; Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389; and *Russell* v.

Sebastian, 233 U.S. 195, 58 L. ed. 912. Compare *Fleming* v. *Nestor*, 363 U.S. 603, 620, 4 L. ed. 2d 1435, 1451. The *Lynch Case* involved not contract impairment but Fifth Amendment due process.

2. 16A *C.J.S.*, "Constitutional Law", Motion p. 6. With deference, note that further said therein, p. 696:

> "* * * The effect of the guaranty is to inhibit the taking of one person's property and giving it to another, contrary to settled usages and modes of procedure, without notice and opportunity for a hearing."

In Section 599, p. 698, it is further said:

> "The term 'property' within the constitutional guaranty against the deprivation of property without due process has been held to include various items of property, and various rights, such as a choses in action; a contract; a franchise; * * *."

And in Footnote 22, p. 699:

> "Impairment of franchise see infra Sec. 605.
>
> "Public utility's franchise rights constitute 'property rights' within protection of due process clause."

Section 605, p. 729:

> "It is a violation of the constitutional inhibition against the taking or deprivation of property without due process of law for a legislative body to control or destroy, by subsequent legislative action, property rights which have legally vested under grants or franchises, unless power for that purpose has been duly reserved."

The requisite reservation was not under discussion. Compare *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 57 L. ed. 1389, approved in *Southern Bell Tel. & Tel. Co.* v. *Meridian*, 241 Miss. 678, 131 So.2d 666, 673.

3. *Fox River Paper Company* v. *Railroad Commission of Wisconsin*, 274 U.S. 651, 71 L. ed. 1279, Motion p. 6. Primarily, the right to review is expressly sustained when this Court said therein, 274 U.S. 653, 71 L. ed. 1282:

> "The right set up in the bill is one under the Federal Constitution. Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this Court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law. * * *."

As to riparian rights, this Court said, 274 U.S. 655, 71 L. ed. 1283:

> "* * * the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state * * *."

But that was a Fourteenth Amendment case basically and not an impairment case. Were it an impairment case, the power of the contracting party to contract and the terms of the contract are with this Court ultimately and thereasto the State Court cannot oust the impairment jurisdiction by a conclusive determination manifestly contrary to the express terms of the contract as precedently adjudged both in the State Court and in this Court. The State Court has solemnly adjudged that the whole (the municipality) does not, during the contract period, embrace all of its parts—an obvious *non sequitur*.

With deference, in 1956, the disputed area unquestionably lay outside of the municipality; but it was the obligation of the State to validly afford power and light and to effectuate, it had authorized that to be done through

its agency. Compare *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1, 43 L. ed. 341. When the State had authorized its agency, for whom it was responsible, to grant a franchise within the municipality as it should exist between 1948 and 1973, the Legislature had, as said in *Fletcher* v. *Peck*, 6 Cranch. 87, 3 L. ed. 162, 178:

> "* * * A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant."

For the State to authorize all municipal franchises for a definite period and then to attempt to take from Appellant and give to Appellee a segment of the municipality without Appellant's consent amounted to an attempted repeal of the grant made to Winona to cover the entire municipality within the franchise as granted and as it would continue until 1973—when Appellant would have had again to purchase from Winona. Let it be noted, a certificate of convenience and necessity may be repealed by the Legislature without impairment (see *State ex rel. Hutton* v. *City of Baton Rouge*, (1950) 217 La. 857, 47 So.2d 665, 668-670; compare *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U.S. 287, 292, 34 L. ed. 976; *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 76 L. ed. 747, especially dissent of Mr. Justice Brandeis); and it was the contention of the municipalities and of this Appellant that this right thus to obtain franchises from the municipalities would continue. The Constitution will not allow the State to grant a certificate and exclude Appellant from an area which the State had validly contracted that the Appellant could occupy when it became within the municipal limits.

In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65, 46 L. ed. 808, the grant by the State to Vicksburg was the prototype of that given the municipalities herein. In

that case, the municipality granted a thirty-year franchise and embraced therein "the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended," and also "within such other territory as may now or hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction," (185 U.S. 69-70). After fourteen years of performance (performance as to Winona has been since 1948 and is continuing), the Court said, 185 U.S. 81:

> "* * * The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years.
>
> "After the lapse of that long period and the continuous acquiescence of the city in the contract as a valid and subsisting one, the city, according to the allegations of the bill, now insists that the said contract was invalid because in excess of its powers to contract, and is proposing to borrow money to erect and maintain waterworks of its own, and become a competitor with the complainant for the custom of the consumers of water. And the question for our consideration is whether the subsequent legislation, state and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States."

And this Court held it did. But after this specific declaration here, how unconvincing does this declaration of the Mississippi Court sound, Motion p. 8:

> "* * * When they were executed by the City, no statute of this state authorized Winona to grant a franchise or street lighting contract to the disputed area, then outside the City. Winona's power was con-

> fined to its corporate limits. The City had no extra-territorial power of any kind to grant company any rights in the disputed area when the contracts were executed.' "

The statutes of Mississippi—the Mississippi Court to the contrary, notwithstanding—authorized Winona to contract for a franchise for the municipality—the entire municipality—for twenty-five years. Note the definition of "municipality" in Section 5527, *Recompiled Mississippi Code of 1942*:

> "(a) The term 'municipality' shall mean any county, incorporated city, town or village in the State of Mississippi."

See also Section 5956-02(d). When the Legislature used the word "municipality", it meant the municipality and all of its parts. Compare Sections 3398-3400, 3402-3423, 3425-3461, 3463, 3465-3469, *Mississippi Code of 1942*.

The basic argument is that when the State had authorized that to be done in manner and form as it did authorize, and its agency, under its complete domination and control so long as contract rights were not involved, had acted to make this contract, it simply cannot be, with deference, that the State can repudiate.

4. The Court declared as to this contract, as quoted by Appellee, Motion p. 8:

> "'* * * The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta (appellee here) by the Commission under the Act attached to the disputed area.' 149 So.2d at 513-14."

The State could not, having authorized as it did, disable itself and repudiate that which its agent had validly pro-

vided. Ever since the municipalities had been thus entrusted with power, every franchise that has been granted has consistently expanded or contracted under the power granted, and had the Act not been passed and construed as it most wrongfully was, there would never have been any such miscarriage as the Constitution must now rectify. Under the *Crumpler Cases, supra*, the water company's franchise ordinance was a contract from the date of its inception; and, being a contract entitled to constitutional protection, the State might not donate that therein granted to another. At least, that is the question here for this Court.

5. *Cobb* v. *City of Malden*, 105 F. Supp. 109, Motion p. 8. This case was modified in 202 F. 2d 701 and was cited by this Court in *Monroe* v. *Pape*, 365 U.S. 167, 5 L. ed. 2d 492, 507; but naught therein is contra.

6. *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 40 L. ed. 838, Motion p. 9. This case holds, p. 849:

> "In conclusion, we hold that where, by a railway charter, a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines."

In accordance with *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. ed. 1079, a general law prohibiting acquisition of a competing carrier was clearly within the police power. See also *Yazoo & M.V.R. Co.* v. *Southern Ry. Co.*, 83 Miss. 746, 36 So. 74.

7. *Ochiltree* v. *Iowa R. R. Contracting Co.*, 21 Wall. 249, 22 L. ed. 546, Motion p. 10, is fundamentally dif-

ferent, in that the party sought to be made liable came into the contract relationship after the repeal of the provision of the Constitution. In our case, the State authorized its agency to contract as to its boundaries and that within those boundaries the franchise would be available. It vested in the municipalities the right to expand or contract, but the provision in the contract was for the entire municipality; and to allow the State to withdraw a fundamental portion of that within the boundaries from the contract is that wherein the impairment is.

8. *Pearsall* v. *Great Northern R. Co.*, 161 U.S. 646, 40 L. ed. 838, Motion p. 12, has been dealt with *supra*. Additionally, if the State could do or leave undone at its pleasure without liability, there would be no contract and neither party would have been bound. Compare 12 *Am. Jur.*, "Contracts", Sec. 24, p. 521, Sec. 66, p. 558; 17 *C.J.S.*, "Contracts", Sec. 318, 736; and A.L.I., *Restatement of Contracts*, Sec. 32. Sp. *Vicksburg Waterworks Co.* v. *Guffy Petroleum Co.*, 86 Miss. 60, 38 So. 302.

9. No complaint is made of *Stone* v. *Mississippi*, 101 U.S. 814, 25 L. ed. 1079; *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 78 L. ed. 413 (Motion p. 13), last cited in *Baker* v. *Carr*, 369 U.S. 186, 7 L. ed. 2d 663, 684. Naught was taken from the promisee therein but time for payment was altered to conserve the public welfare. Here, the entire disputed area is excluded absolutely from Appellant's contract. In the *Blaisdell Case*, *supra*, not a jot or tittle was withdrawn from the performance of the obligation—only conservation for emergency occurred.

10. *Veix* v. *Sixth Ward Bldg. & Loan Association*, 310 U.S. 31, 84 L. ed. 1061, Motion p. 13. Therein this Court held, under then existing circumstances as to fi-

nancial welfare, a change by general statute as to withdrawals could be made when requisite to preserve the financial solvency of the community. This we have not questioned and thereasto in the case cited, it was specifically said, 310 U.S. 40, 84 L. ed. 1067:

> "Appellant relies upon Treigle v. Acme Homestead Asso. as a determinative precedent in support of his argument that the withdrawal arrangements between the association and appellant were contractual and secure from impairment by the statutory exercise of the paramount police power of the State. In that case statutory changes as to the right of withdrawal, similar to these involved here, had been made after the purchase of the shares. The enactment in the Treigle Case occurred after notice of withdrawal. From all the circumstances of the Louisiana building and loan situation at the time of the legislation attacked in the Treigle Case this Court reached the factual conclusion that the withdrawal amendment to the building and loan statutes was directed merely toward a private right and not deemed in the public interest.
>
> "It is to be noted that this Court was careful to point out in the Treigle Case that where the police power is exercised 'for an end which is in fact public' contracts must yield to the accomplishment of that end."

As to the factors requisite to validate police power imposition, note *Jefferson Standard Life Insurance Company* v. *Noble*, 185 Miss. 360, 188 So. 289, 293:

> "Let it be remembered that the contract clause of the Federal Constitution originated in an economic and financial emergency, which obtained following the Revolutionary period, and the legislatures had passed ignoble schemes for the defeat of creditors and the invasion of contractual obligations; and was adopted to 'inspire a general prudence and industry,

and give a regular course to the business of society'. See Blaisdell case, supra (290 U.S. 398, 54 S. Ct. 236).

"So far as credit is concerned, looking to the welfare of the whole State, it is vitally important that unnecessary and uncalled for restrictions be unloosed and contracts made with impunity and confidence: that fear, suspicion, and distrust may be obviated."

11. *East New York Savings Bank* v. *Hahn*, 326 U.S. 229, 90 L. ed. 34, Motion p. 14, contains naught contra.

B. Capital Association's authorities:

1. Counsel quote 3 *Cyclopedia of Federal Procedure*, 3rd Ed., Sec. 6.14, Motion p. 15, but they have made no attempt to reconcile the Mississippi decisions made the basis of the decisions in this Court in the *Crumpler Cases*, *supra*, and it is fundamental that where there is a Federal question, it must be solved here. It was so expressly held in the *Crumpler* litigation and has not been in any way invalidated. As to State questions, this Court could, if it were requisite, remand for appropriate determination. *Southern Bell Tel. & Tel. Co.* v. *City of Meridian*, 358 U.S. 639, 3 L. ed. 2d 562, 241 Miss. 678, 131 So.2d 666.

2. Naught contra is to be found in *Albertson* v. *Millard*, 345 U.S. 242, 97 L. ed. 983, Motion p. 16. We are here for an application of the Constitution to that which has been assumed to be adjudged by the inferior State Court; and the sole issue here is: is there such a Federal question as could possibly be made the predicate for a reversal of the State's construction and a validation of Appellant's claims under the Constitution?

3. *United States* v. *Burnison*, 339 U.S. 87, 94 L. ed. 675, Motion p. 16, followed *United States* v. *Fox*, 94 U.S.

315, 24 L. ed. 192, and merely held that testamentary disposition was absolutely controlled by the State and the United States could not take under a will which the State had not authorized. Applied in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 7 L. ed. 2d 285, 291; *United States* v. *Oregon*, 366 U.S. 643, 6 L. ed. 2d 575, 580, 582.

4. As to 16 *C.J.S.*, "Constitutional Law", Sec. 281, Motion p. 19, this principle has been differentiated *supra*, whereto we make reference.

5. Naught contra is found in *United Gas Corp.* v. *City of Philadelphia*, 238 Miss. 409, 118 So.2d 618, Motion p. 20; the holding was based on a specific reservation of the power to amend in the rate ordinance—as our Court said—"according to the very terms of the franchise it remained in effect only so long as the rates were fair and reasonable *or until changed as provided by law*" (118 So.2d 619).

IV.

THE REA ACT.

We, with deference, challenge the declaration of counsel that as public utilities Appellant and Appellees are upon precisely the same basis. Appellees are a Federal agency, financed by the United States to meet conditions obtaining nationally after the depression. Appellant and the other private investor utilities had been through this ordeal; and when Congress originated this plan and it was explained by those who assumed to speak with authority, Appellant and those similarly circumstanced acquiesced therein upon the assurances thereinto written, after the legislative history quoted at length in the Jurisdictional Statement.

Appellant now finds itself attacked by an REA Association. That Association, contrary to the Federal Act, is the sole protagonist which has wrenched from Appellant that which, with deference, Appellant believed was to it vouchsafed, with the State of Mississippi and the municipalities not appropriately parties. The financial condition of these Associations does not appear in the record; and before this Court for the first time a privately-owned utility is thus assaulted. That whereon we respectfully insist is that Appellant is entitled to protection. We submit that Appellees have not adequately answered that which we propounded to this Court under this point for solution. As said in our Jurisdictional Statement, p. 37:

> "The interplay between Federal and State power in a question of this character can only be solved here. * * *. Behold, contrary to the Contract Clause and the Due Process Clause, that which was Appellant's is now Appellee's under the statute."

CONCLUSION.

It is respectfully submitted that the Motions to Dismiss should be overruled. There are vital Federal questions which inhere; and that at issue is, in part, whether or not that said by this Court is still constitutionally protected? This Court said in *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U.S. 496, 515, 51 L. ed. 1155:

> "In the light of these decisions, and others might be cited, we reach the conclusion that, under a broad grant of power, conferring, without restriction or limitation, upon the city of Vicksburg, the right to make a contract for a supply of water, it was within the right of the city council, in the exercise of this power, to make a binding contract, * * * and, * * * this action of the council is binding and for the time limited

puts the right beyond legislative or municipal alteration to the prejudice of the other contracting party."

In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U.S. 65. 81, 46 L. ed. 808, 815, this Court said:

"• • • And the question for our consideration is whether the subsequent legislation, state, and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States.

• • •

"• • • the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question."

Appellees demand that the basic rights existent in 1886 and expressly relied upon when these contracts were formulated in 1948 be declared now *un*protected by the Federal Constitution. If they so be—and we assert they are still protected—it is vitally necessary that this Court should overrule these Motions and award a hearing upon the merits as this Court alone is competent thus to do. Repudiation by the State would be a criminal act, but repudiation by an interloper—not in privity—is unthinkable. This is especially so when the Public Service Commission, assuming to destroy Appellant's property and cancel its all-requirements contracts, considered the franchises and contracts not germane and thereasto specifically declared:

"• • • We do not consider the municipal franchise granted Mississippi Power & Light Company by the City of Winona to be germane to any of the issues in this cause. Therefore we have disregarded the fran-

chise completely as we believe it has no bearing on the case. * * *."

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APPENDIX "A"

No. 42,535

IN THE SUPREME COURT OF MISSISSIPPI
DELTA ELECTRIC POWER ASSOCIATION

v.

MISSISSIPPI POWER & LIGHT COMPANY, ET AL

ETHRIDGE, JUSTICE:

This case involves an order of the Mississippi Public Service Commission (called Commission), directing Mississippi Power & Light Company (called Company) to cease and desist from rendering electric distribution service or street lighting service in a newly annexed area of the City of Winona, which was certificated by the Commission to Delta Electric Power Association (called Delta). The Mississippi Municipal Association was allowed to intervene. It supported the position of the Company.

The Company and Municipal Association appealed from the Commission's order to the Chancery Court, First Judicial District of Hinds County, which reversed it. That court held that Delta had no right to operate in the disputed area, and ordered Delta to cease and desist from doing so. It adjudicated that the Company's municipal franchise, upon expansion of the city limits, extended into the newly incorporated area, and thereby superseded Delta's certificate from the Commission, issued when the disputed area was outside the city limits.

The facts are without any substantial dispute. The issues are principally those of construction of Section 5 of

the Public Utility Act of 1956, in the light of the facts and several prior decisions. Miss. Laws 1956, Ch. 372; Miss. Code 1942, Rec. Secs. 7716-01 to 7716-38. We conclude the Commission's order was correct, reverse the decree of the Chancery Court, and reinstate and affirm the Commission's issuance of a cease and desist order.

The precise issue is whether, under the Act, the expansion of the city limits extended Company's service area into the annexed area, under its municipal franchise granted prior to the 1956 Act and before the expansion, and superseded the prior grandfather certificate to the annexed tract, granted by the Commission to Delta, which served the area before it came within the city limits. We think it did not, and that Delta's certificate was properly protected by the Commission's order.

Both Delta and Company are public utilities engaged in the transmission and distribution of electricty, and subject to the Public Utility Act of 1956. Miss. Laws 1956, Ch. 372, Sec. ID. Delta is a Mississippi corporation organized and operating under the Electric Power Association Act of 1936. Miss. Laws 1936, Ch. 184; Miss. Laws 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is vested with authority to operate electric services both within and without municipalities. Code Sec. 5474 (8). It has the power of eminent domain. Sec. 5474 (6) (14). Delta has the obligation and duty to render non-discriminatory service to all persons subscribing for it, who live in the areas served by that corporation. Capital Elec. Power Assn. v. McGuffee, 226 Miss. 227, 83 So.2d 837 (1955). It operates in thirteen counties in the state.

Mississippi Power & Light Company, a subsidiary of Middle South Utilities, is incorporated under the laws of Florida, and qualified to do business in Mississippi. All of

its property is located in this state, generally in the western one-half from the Tennessee to the Louisiana line.

Delta was incorporated in 1938. In 1940 it constructed an electric line in the vicinity of, but outside the west corporate limits, of the City of Winona. There were no other electric lines in this area, and electric services was not then available to anyone in this rural area. Delta served the only two customers in it who desired electricity at that time. After it was made available, and as a result of this and other factors, this area west of the city limits slowly developed, over a period of years, and Delta obtained other customers. It served all of these additional customers.

On February 23, 1948, the City of Winona granted a franchise to Mississippi Power & Light Company for electric service in that municipality, its streets and public places, "as they now exist or may hereafter be laid out or extended." This franchise was for a period of twenty-five years, so it expires in 1973. Since 1948 Company has been furnishing electric service in Winona under that franchise. During this same period and since 1940, Delta has been furnishing electric service to those desiring it in the disputed area which was west of the city limits prior to December 31, 1959.

In 1948 the City made a street lighting agreement with the Company, for five years, and renewable for similar additional periods unless either party elected to terminate it. That contract is still in effect.

The Public Utility Act became effective on March 29, 1956. Miss. Laws 1956, Ch. 372, Sec. 40. Before that date there was no statewide regulation by the Public Service Commission or any other state agency of the service areas, rates, or related operations of electric public utilities. Subject to certain limitations, the act vested "exclusive orig-

inal jurisdiction" over these matters in the Commission. *Ibid.*, Sec. 4.

Section 5(b) provides for grandfather or prior service certificates of convenience and necessity. It states that the Commission shall issue such a certificate to any person engaged in the operation of electric facilities and equipment "for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation," if the application was made within six months after the effective date of the act. Both Delta and the Company filed applications within the six months, and thereafter negotiated over a lengthy period for the purpose of agreeing on areas which they should recommend to the Commission for certification to Delta and Company, respectively. They agreed that the disputed area involved in this suit should be certificated to Delta and that certain other areas should be certificated to Company. Hence they submitted to the Commission a letter of agreement and map showing the recommended areas of agreement for prior service certificates.

On November 25, 1959, all of the disputed area involved in this suit was certificated to Delta. The Company was a party to that proceeding, did not appeal from it, and the Commission's order, granting the grandfather certificate to Delta, became final. Delta has continued since that date to serve every electric customer in the area, including two street lights for the City of Winona. Delta's grandfather certificate from the Commission describes the disputed area involved in this suit by metes and bounds, and clearly covers it.

By an ordinance effective December 31, 1959, the City of Winona extended its corporate limits to the north, south,

and to the west. The disputed area here involved is part of the western expansion of the city limits, annexed on that date to the municipal boundaries of Winona.

In May, 1960 the Company, without any authorization from the Commission, constructed an electric line into the disputed area, previously certificated by the Commission to Delta, extended it to the Hightower property, and in June, 1960 constructed two prongs from this line in the disputed area for the purpose of serving street lights. No electric service was actually rendered to the Hightower property. The street lights were operated for several weeks, when the bulbs were removed.

On May 31, 1960 Delta filed the present petition before the Commission, asking it to order the Company to remove its line from Delta's area and to cease and desist offering its electric service to service locations within areas certificated to Delta. The Company filed its answer and cross-petitioned. It took the position that extension of the city limits expanded its precedent franchise from the city to cover the newly annexed area.

After a lengthy hearing, the Commission's supplemental and amended order of July 18, 1961 ordered the Company to cease and desist from offering electric service and operating facilities within the disputed area. It denied the cross-petition. The Commission found that Delta's certificate of November 25, 1959 contained a particular legal description of the area certificated to Delta, which included the disputed area; that the Company did not appeal from the order granting Delta that certificate; that since March 29, 1956 Delta has been rendering reasonably adequate electric service within the disputed area; and the Company's certificate did not include any part of that area certificated to Delta. The Commission stated it

did not consider the municipal franchise granted to the Company by Winona to be germane to the issues, and did not pass upon the validity of that franchise. It ruled solely on the respective rights of the parties arising out of their certificates of convenience and necessity.

I.

Prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of grandfather certificates under Section 5 are made on an area rather than a facility basis; (2) A certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts.

An electric power association is under an obligation to render electric service upon a nondiscriminatory basis to its members and to other persons living in the area. Capital Electric Power Assn. v. McGuffee, 226 Miss. 227, 243, 83 So.2d 837, 84 So.2d 793 (1956). A non exclusive franchise is a valuable right which can be protected in the courts. Miss. Power Light Co. v. Miss. Power District, 230 Miss. 594, 611, 93 So.2d 446 (1957); Payne v. Jackson City Lines, Inc., 220 Miss. 180, 70 So.2d 520 (1954).

In Miss. Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 106 So.2d 375 (1958), it was held that a revenue bond issue, to provide funds for acquisition of electric distribution facilities in a municipality, was void because of defective notice. Whether an electric power association should be permitted to "invade an area" already having electric utility service furnished by the company was first for determination by the Commission. The opinion discussed briefly Section 5 of the Act, recognized the right under Section 5(b) to a grandfather certificate, and ob-

served that under the second paragraph of Section 5(d) provision is made for more than one utility operating within a municipality. 234 Miss. at 634.

United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So.2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946 the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature "reserved the right to pass such laws as may be expedient or necessary in municipal affairs." The 1956 Act superseded pro tanto the precedent franchise to United. The legislature, acting under its police power, had the right to vest in the Commission power to determine rates.

Capital Electric Power Assn. v. Miss. Power & Light Co., 240 Miss. 139, 125 So.2d 739 (1961) (called the Elton case), spelled out in some detail the rights of a holder of a certificate of public convenience and necessity from the Commission. The Elton Company operated a wood-shipping plant three miles south of the City of Jackson. Capital Electric had been serving the area for 17 years, and obtained from the Commission a grandfather certificate under the 1956 Act, which covered the area involved. Nevertheless, Miss. Power & Light Company applied for a certificate to construct lines to Elton, pursuant to its contract with it. The Commission's issuance of a certificate to Mississippi

Power was affirmed by the circuit court, but on appeal that judgment was reversed.

Section 5 of the Act was discussed in some detail. Capital Electric was "obligated to render non-discriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor." Hence it was said that, having served the electric requirements in this area for 17 years, Capital Electric under Section 5(b) acquired the right to a certificate, "being in truth and in fact a franchise from the State. Such right is indeed a valuable one", although nonexclusive. By the Act "it was the intention of the legislature that facilities of one utility should not be duplicated in the same area"; that there should not be "duplication and overriding facilities and certificates." Hence it was said "An existing utility within the certificated area has the right and duty to provide the service, and must be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear."

For emphasis, it was stated: "There should no longer be any doubt as to the rule in this State on that proposition." The Commission could not disregard the requirements of a grandfather certificate under Section 5(b). In summary, the opinion held: "To allow the invasion of Capital Electric's area on account of the desire of Elton Company, regardless of their reasons therefor, to be served by Mississippi Power & Light Company would lay down a principle which would result in endless duplication and make a shamble of the utility act. Such a policy cannot be countenanced by this Court."

Miss. Power Co. v. East Miss. Elec. Power Assn., 140 So. 2d 286 (Miss. 1962), involved principally an area within

one mile around and adjacent to the City of Louisville. Louisville's Electric System contended that, under Sec. 1H of the Act, it had the sole right and privilege of operating within the one mile corridor. That provision stated that any public utility owned by a municipality should not be subject to the provisions of the Act, except as to extensions of utilities greater than one mile outside of corporate boundaries after the effective date. This provision was not a grant, but an exemption from regulation, limited in terms.

East Mississippi had been serving the outside area prior to and on the Act's effective date. It was held the legislature did not intend by this exemption "to take from a company that was operating within said corridor on the date of the Act its right to operate therein," and the Commission was justified in certificating the area to East Mississippi. Whether its certificate could be invaded depended upon whether the Commission found it rendered inadequate service, and failed to remedy it. The award of a certificate, it was held, is made on an area rather than a facility basis. *Capital Electric* so held. Moreover, East Mississippi was a public utility in statutory contemplation. Cf., Miss. Public Service Commission v. Holloway Transfer & Storage Co., No. 42,476, decided January 14, 1963 (Motor Vehicle Act).

In short, prior decisions under the Public Utility Act of 1956 hold that certificates to public utilities are based on an area basis, are valuable rights, although nonexclusive, entitled to protection of the courts, and the Commission (under Section 4) has "exclusive original jurisdiction over the intrastate business and property of public utilities." Cf., Miss. Code 1942, Rec., Secs. 5490-5497 (1938 preemption statutes for power assns.)

II.

Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not Consistent with the terms of the Act or with the legislative purposes.

The title of Ch. 372, Laws of 1956, states it is an act to "vest authority" in the Commission "to regulate certain public utilities." The preamble reveals legislative concern with utility services "both within and outside of municipalities," and the purpose to vest controlling power in the Commission "to regulate such utilities' rates and services." Section 4 gives it "exclusive original jurisdiction," with certain exceptions. There is no indication that a municipal expansion of boundaries would supersede a prior certificate from the Commission.

Subsection (d) of Section 5 is aimed at the precise issue involved here: "Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for ex-

tension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. . . ."

Subsection (d) recognizes that two public utilities, such as Delta and Company, may hold certificates for similar operations in the same municipality. It authorizes operations to be carried on by them "within their respective certificated areas," and exempts them from further application for extension of their facilities within their "respective certificated areas of said municipality, including any extensions of the corporate limits thereof." In other words if such utilities extend or add to their facilities within their respective certificated areas of the city, which would include extensions of corporate limits of the city, they are exempt from further application to the Commission for such extensions or additions. This assumes the annexed areas are within the respective certificated areas of the two utilities.

The second paragraph of subsection (d) recognizes that both "co-operatives" and other utilities may operate within a municipality at the same time, and in such event they are subject to rate regulation. In short, subsection (d) specifically applies to and recognizes the existence of a situation such as that here presented, where Delta and the Company have respective certificated areas in the municipality, under the extension of the city limits. Section 5 (d) applies to certificate holders for areas subsequently annexed to municipalities. This is evidenced from the phrase, "including any extensions of the corporate limits thereof."

Subsections (b), (c), and (d), of Section 5, must be read together. Subsection (b), mandatory in nature, requires the Commission to issue a grandfather certificate where a person, as defined, is engaged in the operation of facilities on the effective date of the Act, March 29, 1956. Subsection (c) provides that "in all other cases" the Commission shall have a hearing on certificate applications, "provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality *being served by the holder of a certificate of convenience and necessity*, . . ." (emphasis supplied) Hence if there is only one holder of a certificate within a municipality, then it can construct extensions anywhere in the corporate limits without further application to the Commission. However, under subsection (d), where there are two holders of certificates in the same municipality, then each holder is only exempt from further application to the Commission for extensions *within its own certificated area* of the municipality.

The quoted part of subsection (c), upon which Company relies, must be considered along with subsection (d). When read together, the foregoing interpretation renders both subsections consistent with one another, the terms of the statute, and a reasonable exercise of legislative discretion. Accordingly, under subsection (d), when there were two persons holding valid certificates for electric operations in separate areas in Winona, as extended, these certificate holders had the right to carry on their operations in their respective certified areas within the municipality, without making further application to the Commission for extensions and additions of their facilities, within their respective certificated areas.

The reference in subsection (d) to "respective certificated areas" reflects a legislative intent to exempt the

holder of a certificate, and not the holder of a municipal franchise. Throughout Section 5, the statute uses the words "certificate" and "franchise" correctly and distinctly. If the legislature had intended to exempt the holder of a municipal franchise, then it would have used the term "municipal franchise" instead of the word "certificate." When it referred to extensions "within their respective certificated areas," it intended areas which had been certificated by the Commission, not areas for which a municipal franchise only had been issued. If it had intended the latter, it would have said so.

Furthermore, subsection (b) made it mandatory for the Commission to issue a certificate to Delta for the areas it was serving outside the then corporate limits of Winona. The legislature knew that corporate limits sometimes expand. If it had intended the Commission should not issue certificates for areas near corporate limits, in view of possible future expansions, then presumably it would have so stated, and not used the mandatory language of subsection (b).

The phrase "municipal franchises" is used numerous times in Section 5. Yet it does not provide that when a certificated area is taken within a municipality, the Commission's certificate would be cancelled. The clear inference is that the legislature did not intend that result. Moreover, there is no provision that, after a certificate has been issued by the Commission, it shall be necessary, after corporate limits are extended, for a municipal franchise also to be obtained.

Nor is there any direction that a municipal expansion shall cancel or in any way affect a Commission certificate. The exclusive method for cancellation of such a certificate is prescribde in subsection (f), Section 5, where a utility is

not rendering reasonably adequate service, and fails to do so after ordered to correct it. Yet Company's argument would add an additional ground for cancellation of a Commission certificate, namely, where a municipality has extended its corporate limits into a previously certificated area. The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods. 50 Am. Jur., Statutes, Secs. 244-46; Tepper Bros. v. Buttross, 178 Miss. 659, 664, 174 So. 556 (1937).

The next to last sentence of subsection (e) contemplates power associations operating within a city and paying for that privilege. It says that any co-operative operating "within *any area* of a municipality" shall pay it two percent of gross revenue from inside sales. Furthermore, the first sentence of Section 5 provides that no person shall construct, acquire or operate equipment for distribution of electricity "without first having obtained from the Commission a certificate." There is no exception which would authorize a municipality, by issuing a franchise, to excuse this requirement of a certificate.

Subsection (e) recognizes that a public utility, which holds "a certificate of convenience and necessity granted under the provisions of this act covering the geographical area of such municipality," may after the expiration of a "municipal franchise" continue to use the streets upon condition of payment of compensation therefor at the rate of two percent of sales to customers within the city. Nevertheless, the utility must have a certificate from the Commission.

Subsection (g) of Section 5, upon which Company particularly relies, has a restricted application. It constitutes a limitation on the Commission, as of the time of issuing

a certificate, for an area which at that time is in a municipality. It prohibits the Commission from issuing to a utility a certificate for an area *then* in a municipality, unless the utility has a franchise from the municipality. It presupposes the pending application is for a certificate. Here Delta is not seeking a certificate for any service territory. It already has a valid certificate covering the disputed tract, granted to it by the Commission before the expansion of the city limits, and at a time when no part of the area was within the corporate limits.

Subsection (g) also presupposes that an applicant for a certificate within a municipality has a municipal franchise, which it must attach to its application. Moreover, it does not require that any further application be filed after a certificate is once granted by the Commission. This construction is further supported by the third sentence of subsection (g). It states that if a municipality arbitrarily refuses to grant a franchise to a utility "now operating within said municipality," then the utility can obtain a Commission certificate for a municipal area without having a franchise. See Miss. Valley Gas Co. v. City of Jackson, 236 Miss. 81, 109 So. 2d 637 (1959). The phrase "now operating" refers to the effective date of the Act, March 29, 1956. No similar relief was provided for a utility holding a certificate for an area outside of a municipality, which is taken into it after that date, and the franchise arbitrarily is denied. This omission warrants the conclusion the legislature intended that, when a certificate was once validly granted, (as it was to Delta), it would remain valid even though the area was subsequently annexed by a municipality; and that such annexation would not make it necessary for the utility to apply again for the area already certified to it. If that were not so, the legislature as a matter of equality would have afforded presumably the same

relief from arbitrariness to a utility whose certificated area was brought into a city by a municipal expansion.

III.

In the drafting of Section 5 of the Act, the legislature was aware manifestly of municipal franchises, Commission certificates, and extensions of corporate limits. It mentioned all of them in the Act. If it had intended that extension of municipal limits would cancel, modify, or affect in any way a certificate of convenience and necessity from the Commission, it no doubt would have provided for such cancellation. There is no such directive. To read into the Act a requirement that any extension of municipal limits would cancel *pro tanto* a certificate from the Commission would be unwarranted.

Moreover, it would impute to the legislature an intent inconsistent with its purpose to avoid duplicating facilities The dominant policy which the legislature had in view must be considered. See Zeigler v. Zeigler, 174 Miss. 302, 310, 164 So. 768 (1935); Sheffield v. Reece, 201 Miss. 133, 143, 23 So. 2d 745 (1947); Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 510-511, 62 So. 2d 772 (1953). This maintains the *status quo* in the disputed area.

Subsection (d) authorizes two electric utilities to serve separate certificated areas in the same municipality. This would result in no duplication or inconvenience, the legislature apparently concluded, although the contrary might well be the case where two transit companies are serving in one city. At any rate, subsection (d) of Section 5 makes it clear that two utilities may hold certificates from the Commission for separate areas in the same municipality. The legislative history in the Senate, as reflected in the Journal, is too sketchy and indefinite to be of assist-

ance in the Act's interpretation on the present issues. Miss. Senate Journal, 1956, pp. 327, 329, 353-359, 391, 405-408, 510, 540-542, 575. Moreover, the statute as finally enacted is the controlling guide.

A municipality in Mississippi is a creature of the State. It has only such power and authority as may be granted to it by statute. Adams v. Kuykendall, 83 Miss. 571, 590, 35 So. 830 (1903). The powers given municipalities to grant utility franchise and the right to use their streets and public places are subject to legislative control. Miss. Code 1942, Rec., Secs. 3374-73, 3374-85, 3374-119, 3374-120, 3374-129. The same applies to the power to extend municipal boundaries. Code Secs 3374-10 to 3374-16. Code Sec. 2780 gives power associations the privilege to construct their lines over public roads and lands, subject to regulation.

All of these statutes must be read together, and in the light of the subsequently enacted Public Utility Act of 1956. To the extent that the latter statute is inconsistent with any of the former's provisions, the Act modifies them. All were enacted under the police power of the state. Superior Oil Co. v. Foote, 214 Miss. 857, 59 So. 2d (1952). We do not consider or decide any issues unnecessary for the decision of this case. We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to Company, did not supersede Delta's certificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power

over areas then outside of municipalities, nor its power to control and regulate municipal activities.

Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect. Anno., 13 Am. & Eng. Ann. Cas. 136 (1909).

A municipality's power over its streets is derived from the state, which has plenary control over them, including the right to grant the use of streets to others. So. Bell Tel. & Tel. Co. v. Meridian, 241 Miss. 678, 131 So. 2d 666 (1961). Code Sec. 2780 granted that right to Delta in the disputed area long before the annexation. After that event, the governing body of a municipality has the right to regulate reasonably the manner in which Delta's lines and appliances are constructed and maintained, subject to the original, primary jurisdiction of the Commission over all services and facilities of public utilities under the 1956 Act.

IV.

Appellees contend that to deny extension of the corporate franchise and street lighting contract to the disputed area would violate the impairment of contracts and due process clauses of both the State and Federal Constitutions. Miss. Const. 1890, Secs. 14, 16; U.S. Const., Art. I, Sec. 10, par. 1; 14th Amend. We find no merit in this position. It is based on the assumption that the franchise and street lighting contract, which were granted Company by Winona when the disputed area was not within the corporate limits, vested in Company rights in that area, which was then outside of municipal limits. When they were executed by the city, no statute of this state authorized Winona to

grant a franchise or street lighting contract to the disputed area, then outside the city. Winona's power was confined to its corporate limits. The city had no extraterritorial power of any kind to grant Company any rights in the disputed area when the contracts were executed.

On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the police power of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit, because before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area. There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute, but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26 (d) (scope of review).

There was no error in the Commission's overruling Company's plea to its jurisdiction, and the motion to dismiss Delta's petition. Appellant did not seek any relief against the City of Winona. It only sought an order directing Company to remove its lines in the disputed area, relying upon its certificate from the Commission. Hence the city was not a necessary party to the suit. Moreover, at Company's instance, the Commission struck from Delta's pleading allegations attacking validity of the franchise, and properly ruled that it had no power to pass upon that issue.

Stegall v. City of Jackson, 141 So. 2d 236, 143 So. 2d 298 (Miss. 1962), does not affect this case. It held only

that land developers who, without authority, laid sewer lines in streets and county roads, without any recorded reservation, dedicated that system to the public use, and could not recover its value from the city which annexed the area. However, *Stegall* (141 So. 2d at 241) referred to Gwin v. City of Greenwood, 150 Miss. 656, 115 So. 890, 58 A.L.R. 849 (1928), which has some relevancy here. There the owner of a subdivision outside of the city limits dedicated the streets, but reserved the exclusive right to operate water and sewer lines thereon. Later the city extended its boundaries to include this area. It was held the municipality had no right to enjoin Gwin from interfering with its extension of water mains. The reservation in the dedication reserved in the dedicator a private right of property, when the reservation was made before the area was brought into the city limits.

Appellees argue as analogous precedents from other states several cases in which municipalities have extended their boundaries, affecting previously acquired utility rights in the annexed area. Farmers Electric Co-op. Corp. v. Ark. Power & Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952), but changed by Ark. Laws 1955, Act. No. 85, and Ark. Laws 1957, Act. No. 103; Wichita Falls v. Bowen, 143 Tex. 45, 182 S.W.2d 695 (1944); Omaha Transit Co. v. Briggs, 167 Neb. 703; 94 N.W.2d 461, 28 PUR 3d 26 (1959); Whitaker v. Louisville Transit Co., 274 S.W.2d 391 (Ky. 1954); Rosehill Cemetery Co. v. Chicago, 352 Ill. 11, 185 N.E. 170 (1933); Deneen v. Houghton Co. St.-Ry. Co., 150 Mich. 235, 113 N.W. 1126, 13 Am. & Eng. Ann. Cas. 134 (1907); Public Service Co. v. Public Utility Comm. of Colo., 142 Colo. 135, 350 P.2d 543 (1960); Clarke-Washington Elec. Membership Corp. v. Ala. Power Co., 272 Ala. 598, 133 So. 2d 488 (1961). These cases are not persuasive here. They are based essentially upon the particular statutes and constitutional

provisions of the specific states. They involve issues and statutes different from those arising under the Public Utility Act of 1956.

In summary, on the direct appeal by Delta, the judgment of the chancery court, which reversed and set aside the order of the Public Service Commission, is reversed. The order of the Commission is reinstated and affirmed. Appellees' cross appeal on the jurisdictional issue is without merit. Hence on the cross appeal the case is affirmed.

ON DIRECT APPEAL, REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED: ON CROSS APPEAL, AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "B"

No. 42,480

IN THE SUPREME COURT OF MISSISSIPPI
CAPITAL ELECTRIC POWER ASSOCIATION

Vs.

MISSISSIPPI POWER & LIGHT COMPANY AND CITY OF CLINTON, MISSISSIPPI, ET AL.

KYLE, JUSTICE:

This case is before us on appeal by Capital Electric Power Association from a decree of the Chancery Court of the First Judicial District of Hinds County, reversing a cease and desist order issued by the Mississippi Public Service Commission on July 6, 1961, upon the petition of Capital Electric, ordering that Mississippi Power & Light Company cease and desist from rendering electric serv-

ice or street lighting service in an area recently annexed to the City of Clinton, which had been certificated to Capital Electric by the Public Service Commission.

The record shows that Capital Electric Power Association is a Mississippi Corporation organized and existing under authority of the Electric Power Association Act of 1936, Miss. Laws 1936, Ch. 184; Miss. Laws, 1938, Chs. 251-252; Miss. Code 1942, Rec., Secs. 5463-5489. It is a public utility engaged in the transmission and distribution of electricity for lighting, heating and power purposes, and is vested with authority to operate electric services both in and without municipalities. Code Sec. 5473(8). It has the power of eminent domain. Sec. 5474 (16) (14). Capital Electric operates in parts of seven counties in the central part of the state, including the area lying east of the City of Clinton in Hinds County, and is obligated to render nondiscriminatory service to all persons living in its service areas who apply for such service.

The area involved in this controversy is an area approximately 1/4 mile wide, east and west, and 1/2 mile long, north and south, lying immediately east of the corporate limits of the City as the same existed prior to March 25, 1960. The area is bounded on the north by the right of way line of Clinton Boulevard, on the west side by the city limits as they existed prior to March 25, 1960, and on the south by old U.S. Highway No. 80, and on the east by the north-south half section line running through Section 28, Township 6 North, Range 1 West. The area is referred to in the record and in the briefs filed on this appeal as the "disputed area"; and will be referred to by us in the same manner.

The record shows that Capital Electric began to furnish electric service to persons desiring such service in

the disputed area in 1944, and has continued to serve all persons applying for such service since that time. Lines have been added as needed. Such service was being furnished to 14 subscribers, including residential, church and commercial, at the time of the hearing of this cause. Neither Mississippi Power & Light Company nor any other electric utility had ever furnished electric service to subscribers in the area prior to the annexation of the area by the City of Clinton on March 25, 1960, except residents of two dwelling houses located on the extreme northern edge for which electric service had been provided by the Company for two of its employees prior to the enactment of Ch. 372, Laws of 1956, and which were "frozen" by agreement of the parties and an order of the Public Service Commission dated September 21, 1959.

The record shows that, after the enactment of the Public Utility Act, Ch. 372, Laws of 1956, which became effective March 29, 1956, Capital Electric filed with the Public Service Commission under authority of paragraph (b) of Section 5 of the Act, commonly called the "grandfather" clause, its application for a certificate of public convenience and necessity authorizing it to continue its operations as a public utility serving the designated areas which were being served by it on the effective date of the Act. The application was entered upon the docket of the Commission as Docket No. U-84. Mississippi Power & Light Company was made a party to the proceeding. After extended negotiations between Capital Electric and the Company for the settlement of area claims, the Commission, by an order entered in Docket No. U-84 on September 21, 1959, granted to Capital Electric a certificate of public convenience and necessity, covering the areas which were being served by it on the effective date of the Act, including the area involved in this controversy. The

area certificated to Capital Electric as its service area was described in the order of the Commission by metes and bounds and included the area involved in this controversy. No petition for a rehearing was filed, and no appeal was taken from the final order of the Commission in that matter; and thereafter Capital Electric continued to furnish electric service to its subscribers in the area. The record shows that Capital Electric does not have and has never had a municipal franchise in the City of Clinton. It does not have and has never had a street lighting agreement with the City of Clinton. However, the record shows that a written offer was made by Capital Electric to the City on August 23, 1960, to furnish street lighting service to the City in the disputed area on the same terms as such service was being rendered by Mississippi Power & Light Company.

The record shows that the appellee, Mississippi Power & Light Company, hereinafter referred to as the Company, is an investor-owned public utility incorporated under the laws of the State of Florida and qualified to do business in the State of Mississippi. All of its property is located in the western half of the state. Its general offices are located in the City of Jackson. The Company has operated in Mississippi since 1924. Its current franchise, authorizing the use of the streets, highways and public places in the City of Clinton, was granted by the City on December 6, 1946, for a period of 25 years. On December 16, 1946, the governing authorities of the municipality approved an exclusive street lighting contract with the Company, which provided that, "Company will furnish and municipality will take and pay for its entire street lighting service during the term of this agreement." The contract had been in effect continuously from December 16, 1946, to the date of the hearing.

On November 25, 1959, the Public Service Commission, in Docket No. U-44, granted to the Company a "grandfather" certificate of public convenience and necessity, pursuant to the provisions of paragraph (b) of Section 5, of the Public Utility Act, covering numerous areas in various parts of the state, including the area lying within the corporate limits of the City of Clinton, but not including the area involved in this controversy which at that time was not a part of the City. As in the case of Capital Electric, the Company's "grandfather" certificate described the service areas of the utility by metes and bounds.

The events leading up to the filing by Capital Electric of its petition against the Company in this cause asking for a cease and desist order were substantially as follows: The decree of the Chancery Court of the First Judicial District of Hinds County, approving the extension of the city limits of the City of Clinton so as to include within the City the area involved in this controversy, along with certain other small areas lying outside of the City, became final on March 25, 1960. On May 3, 1960, the mayor and board of aldermen of the City adopted a resolution authorizing the mayor and clerk to execute in behalf of the City a supplemental agreement with the Company for the furnishing of street lighting in the newly annexed territory. The city clerk thereupon addressed a letter to the Company's manager designating certain locations for new street lights to be installed by the Company on Morrison Drive, and on May 16, 1960, the Company's workmen entered the disputed area and erected a distribution line covering a distance of 1775 feet. The line entered the disputed area on the north at the intersection of the south right of way line of Clinton Boulevard and Morrison Drive and ran in a southerly direction along Morrison Drive

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to the north right of way line of U.S. Highway 80. The line was built immediately across the street from Capital Electric's line and duplicated Capital Electric's line. The Company also installed five street lights, four of which were located directly across the street from street lights already provided by Capital Electric, which were then in operation. The Company also installed a permanent service line into the newly constructed residence of C. M. Kelley, where Capital Electric Service was already being used for construction purposes.

On May 25, 1960, Capital Electric filed its petition in this cause with the Public Service Commission and asked that, upon the hearing of the petition, the Commission enter an order directing the Company to remove the line so constructed by it in the disputed area, and directing that the Company cease and desist offering its service to service locations or constructing service facilities within the disputed area. Capital Electric also asked for general relief.

The Company filed its answer to the petition on July 22, 1960. In its answer the Company admitted that on May 16, 1960, it had built the line in question within the disputed area, and that it had served the owner of one residence from that line and had also installed along Morrison Drive five street lights. As matters of affirmative defense, the Company alleged that it was operating under a franchise from the City of Clinton dated December 16, 1946, which was a 25-year franchise and that the rights and obligations conferred by the City upon the Company by that franchise were protected by Ch. 372, Laws of 1956, and particularly by paragraph (g) of Section 5 thereof. The Company further alleged that it was the only supplier of electric energy operating in the City or any part thereof

to which a franchise had been granted by the City, and that it was paying the City two per cent of its domestic and commercial receipts derived from its operations within the City. It alleged that Capital Electric had applied to the City for a franchise, and that the mayor and board of aldermen had refused to grant the same.

The Company further alleged that it had received on November 25, 1959, in Cause No. U-44, a "grandfather" certificate to serve the City of Clinton, pursuant to Section 5(b) of the Public Utility Act; that it had an exclusive street lighting contract with the City under which it was presently operating; that its right to furnish electric service in the area which had been incorporated into the city was protected by the due process clause and equal protection clause of the Constitution of the United States and the due process clause of the Mississippi Constitution. The Company alleged that it had offered to purchase from Capital Electric, or to trade with Capital Electric for other facilities located elsewhere, all facilities which Capital Electric had in the City of Clinton. The Company incorporated in its answer a cross petition in which it asked that Capital Electric be ordered to cease and desist from maintaining its electric distribution service in the disputed area, and to remove its equipment and distribution facilities from the area.

The Mississippi Municipal Association filed a petition asking that it be permitted to intervene on behalf of the municipalities of the state as parties interested in the litigation. The City of Clinton also filed a petition asking that it be permitted to intervene as an interested party. Both petitions were granted by orders of the Commission dated September 16, 1960. The Municipal Association then filed its answer to the petition of Capital Electric; and

the City of Clinton filed an answer and cross-petition in which it averred that Capital Electric had no right to continue to operate its facilities in the disputed area after March 25, 1960, for the reason that it had never been granted a franchise to operate within the City.

Extended hearings were held by the Public Service Commission on the issues presented by the pleadings. The hearings were concluded on February 27, 1961. The Commission took the case under advisement, and on July 6, 1961, the Commission rendered its decision in favor of Capital Electric and entered a cease and desist order as prayed for in Capital Electric's petition. The relief prayed for in the cross petitions filed by Mississippi Power & Light Company and the City of Clinton was denied, and the cross petitions were dismissed.

The Commission in its order found that Capital Electric had been granted a certificate of convenience and necessity by the Commission in Docket No. U-84 on September 21, 1959, which authorized it to continue to operate its electric facilities and serve the needs of electric consumers in the area that it was serving on March 29, 1956, the effective date of the Public Utility Act; that the certificate of convenience and necessity contained a particular description of the area involved in this litigation; and that continuously, since March 29, 1956, Capital Electric had been rendering reasonably adequate electric service within the area. The Commission found that the new facilities constructed by Mississippi Power & Light Company in the disputed area were within the areas specifically certificated to Capital Electric by the Commission in Docket No. U-84; and that the Company, unless ordered to cease and desist therefrom, would offer and render electric service to consumers of electric power within the

disputed area, and would continue to render street lighting service within the area; that the real issue in the controversy was whether or not the holder of a certificate of convenience and necessity issued by the Commission was entitled to be protected against an invasion of its certificated area by the construction and operation of electric facilities therein by another electric utility which did not have a certificate authorizing it to serve the area. The Commission was of the opinion that the municipal franchise granted to the Company by the City of Clinton was not germane to any of the issues in the cause and had no bearing on the case. The Commission did not pass upon the validity of the franchise or attempt to construe its provisions.

The Commission, by an order duly entered upon its minutes, ordered that the respondent, Mississippi Power & Light Company, cease and desist from rendering any electric distribution service or street lighting service in the disputed area, and that the Company remove "all of its electric lines and facilities, which it has constructed and is now operating and maintaining within the disputed area," within a period of 30 days from the date of the order. In its order the Commission stated that its decision was based solely upon the rights arising out of the certificates of convenience and necessity granted the two utilities in Docket Nos. U-44 and U-84; that the first certificate did not include the disputed area; that the second certificate did include the area in question. From that order the respondent, Mississippi Power & Light Company, prosecuted an appeal to the Chancery Court of the First Judicial District of Hinds County. The City of Clinton and the Mississippi Municipal Association likewise prosecuted appeals.

The cause was heard by the chancery court as an intermediate court of appeals upon the voluminous record made during the hearing before the Commission, and on April 20, 1962, that court entered a judgment reversing the order of the Public Service Commission and ordering that the petition of Capital Electric for a cease and desist order be dismissed. The court was of the opinion that the order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton; that, when the City of Clinton extended its corporate limits and annexed adjoining areas which included the disputed area in this cause the certificate of convenience and necessity granted to Capital Electric under the Public Utility Act of 1956, in so far as it covered the disputed area, became ineffective and Capital Electric could not operate within the corporate limits of the City inasmuch as it had not been granted a franchise by the City. The cause is now before us on appeal by Capital Electric from the judgment entered by the chancery court reversing the order of the Commission.

The attorneys for Capital Electric have assigned and argued four main points as ground for reversal of the judgment of the lower court:

(1) That the court erred in holding that when the City of Clinton expanded its corporate limits on March 25, 1960, and annexed the disputed area, the certificate of public convenience and necessity theretofore issued by the Public Service Commission to Capital Electric, under and pursuant to Section 5(b) of the Public Utility Act of 1956, became ineffective in so far as it covered the disputed area; (2) that the court erred in holding that the expansion of the corporate limits of the City of Clinton on March 25, 1960, destroyed the vested service rights acquired by Capital Electric by virtue of its having served

the disputed area for many years prior to that date, which rights had been recognized and expressly reserved and granted to Capital Electric by the terms of the Public Utility Act itself; (3) that the court erred in holding that Capital Electric was barred of its right to operate within the disputed area after the annexation by the City for the reason that Capital Electric had not been granted a municipal franchise by the City; (4) that the court erred in its holding that the cease and desist order of the Commission issued on July 6, 1961, was erroneous in law and violative of the statutory rights of Mississippi Power & Light Company and the City of Clinton.

It is argued on behalf of the appellees in support of the judgment of the lower court that the statutes of Mississippi in unmistakable terms, have given to municipalities complete jurisdiction of streets and the absolute right to regulate by franchise the use which can be made of the streets by public utilities; that the power to determine what utilities may operate within and use the streets and public ways of a municipality is definitely vested in the municipality by Sections 3374-119 and 3371-120, and Section 3374-73, Miss. Code of 1942, Rec.; and that only those acquiring and holding a franchise from the municipality itself can operate a utility therein. It is also argued on behalf of the appellees that it clearly appears from the language used in paragraph (g) of Section 5 of the Public Utility Act that it was the legislative intent that a utility should not be permitted to operate within a municipality without first obtaining a franchise from the municipality; that Capital Electric had not been granted a franchise by the City of Clinton, and for that reason the chancery court was eminently correct in its holding that Capital Electric should no longer be permitted to operate in the disputed area since the area had been annexed to and made a part of the City.

The questions of law presented for our decision on this appeal are substantially the same as the questions presented in Delta Electric Power Association v. Mississippi Power & Light Co., et al., Cause No. 42,535, decided by this Court on February 11, 1963. There is no substantial dispute as to the facts in this case, and on the questions of law the opinion rendered in the Delta Electric Power Association Case is controlling here. We think there was error in the court's holding that the cease and desist order of the Commission violated the statutory rights of Mississippi Power & Light Company and the City of Clinton. We also think that there was error in its holding that the extension of the corporate limits of the City of Clinton so as to include the disputed area within the City rendered ineffective as to that area the certificate of convenience and necessity granted to Capital Electric under authority of paragraph (b) of Section 5 of the Public Utility Act, and in its holding that Capital Electric was barred of its right to operate within the disputed area after its annexation to the City without first obtaining a franchise from the City.

As stated by the Court in the opinion rendered in the Delta Electric Power Association Case, prior decisions interpreting the Public Utility Act have established two propositions: (1) Awards by the Commission of "grandfather" certificates under Section 5 are made on an area rather than a facility basis; and (2) a certificate of convenience and necessity issued by the Commission is a valuable right which is entitled to protection by the courts. Capital Electric Power Association v. Mississippi Power & Light Co., 240 Miss. 139, 125 So.2d 739; Mississippi Power Co., et al. v. East Mississippi Electric Power Association and Public Service Commission (Miss. 1962), 140 So.2d 286.

In Capital Electric Power Association v. Mississippi Power & Light Co., supra, which is generally referred to as the "Elton Case," the Court, in discussing the nature of the right acquired by Capital Electric by virtue of the certificate of convenience and necessity issued to it under paragraph (b) of Section 5 of the Public Utility Act, said: "Capital Electric Power Association is a corporation chartered and operated under Chapter 184, Laws of 1936, Section 5463 et seq., Code of 1942. It is obligated to render nondiscriminatory service to persons living in the area served by it and on the routes traversed by its distribution lines, if they subscribe therefor. Capital Electric Power Ass'n. v. McGuffee, 226 Miss. 227, 83 So.2d 837, 84 So.2d 793, 56 A.L.R. 2d 403. Having served the electrical requirements in the Elton area for more than 17 years, Capital Electric, under paragraph (b) of Section 5, Laws of 1956, Section 7716-05, Code of 1942, acquired the right to a certificate of convenience and necessity therein, being in truth and in fact a franchise from the State. Such right is indeed a valuable one. 'A non-exclusive franchise is a valuable right which can be protected in the courts.'"

In the Delta Electric Power Association case, the court had under consideration the effect of the annexation by the City of Winona of an area lying west of the City, which constituted a part of the service area certificated to Delta Electric by the Public Service Commission and which the Company claimed under a municipal franchise granted by the City many years prior to the annexation; and in its opinion in that case the Court said: "Prior to the Public Utility Act of 1956, Delta for many years had been serving customers in the disputed area, when it was not within the municipal limits. Before the 1959 expansion of Winona's boundaries, Delta obtained its certificate from the Commission to serve that area. The Company's certificate

did not include it. We do not think the Act is susceptible of a construction which would permit subsequent expansion of the city limits to extend the Company's service rights into the disputed territory. If it should, this would permit Company's franchise from the city, executed long before the annexation, when coupled with the expansion order, to supersede the prior grandfather certificate granted by the Commission to Delta for the disputed area. This is not consistent with the terms of the Act or with the legislative purposes."

What was said in the Delta Electric Power Association case is equally applicable to the facts in this case. The Public Utility Act, in our opinion, is not susceptible of the construction contended for by the appellees and adopted by the lower court, that, when the City of Clinton extended its corporate limits and annexed the disputed area the certificate of convenience and necessity granted to Capital Electric under paragraph (b) of Section 5 of the Act, in so far as it covered the disputed area, became ineffective. If the legislature had intended that awards by the Commission of service areas under the "grandfather" clause of Section 5 of the Act should be only tentative and subject to change in the event a portion of the certificated area lying outside of a municipality on the effective date of the Act should be thereafter incorporated in a municipality, the legislature in our opinion would have expressly provided for such change and for payment of compensation to the utility whose rights were adversely affected.

As to the appellees' contention that paragraph (g) of Section 5 of the Public Utility Act indicates a legislative intent that a utility shall be required to obtain a franchise from the municipality before operating therein, we think that contention has been fully answered in the opinion rendered in the Delta Electric Power Association case.

There is nothing in paragraph (g) of Section 5 to indicate that a utility which has obtained and is operating under a certificate of convenience and necessity issued by the Commission shall have its certificate revoked in whole or in part, or shall be required to apply for another certificate of convenience and necessity, if a part of its certificated area is later incorporated into a municipality.

It is finally contended on behalf of the appellee, Mississippi Power & Light Company, that to deny extension of the Company's municipal franchise and street lighting contract to the disputed area in this case would violate the impairment of contracts and due process clauses of the state and Federal constitutions. Mississippi Constitution of 1890, Secs. 14, 16; U. S. Constitution, Art. I, Sec. 10, par. 1; 14th Amendment. But that contention has also been answered in the opinion rendered in the Delta Electric Power Association case.

For the reasons stated above the judgment of the lower court, which reversed and set aside the order of the Public Service Commission, is reversed; and the order of the Public Service Commission is reinstated and affirmed.

REVERSED AND ORDER OF PUBLIC SERVICE COMMISSION REINSTATED AND AFFIRMED.

ALL JUSTICES CONCUR.

APPENDIX "C"

An Ordinance

Granting an Electric Franchise to Mississippi Power & Light Company, its Successors and Assigns, in the City of Winona, Fixing the Terms Thereof, Prescribing the Obligations Thereasto, and for Other Purposes.

BE IT ORDAINED By the Mayor and Board of Aldermen of the City of Winona, Mississippi, lawfully assembled:

SECTION 1. In consideration of the benefits that will accrue to the municipality and the inhabitants thereof, Mississippi Power & Light Company, a corporation, (hereinafter called Grantee) is hereby vested with full right, authority, easements, privileges and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain, operate and conduct in said municipality a plant or plants and a system for the manufacture or distribution of electric current for all purposes whatsoever, for a term of twenty-five years from date of passage.

SECTION 2. The Grantee is hereby further given and vested with full right, authority, easements, privilege and franchise to construct, re-construct, erect, suspend, install, renew, maintain, operate and conduct in said municipality a system of poles, towers, conduits, cables, conductors, transformers, fittings, and all appliances and appurtenances now, or hereafter, during the life of this franchise, necessary or desirable to the transmission, distribution, and or sale of electric current, for all purposes whatsoever, in, over, under, along, upon and across all streets, alleys, ways, bridges and public places and other

municipal property in said municipality, as they now exist, or may hereafter be laid out or extended, together with the further full right, privilege, easement, authority and franchise to construct, re-construct, erect, suspend, install, renew, repair, maintain and operate said poles, towers, conduits, cables, conductors, transformers, fittings and all other appliances and appurtenances now or hereafter, during the life of this franchise, necessary or desirable for the transmission within, through and over and beyond said municipality, and to electricity consumers, both within and beyond the limits thereof, electricity for lighting, heating, power and all other purposes for which electricity may be now, or hereafter used, and for the purpose of extending its system beyond the limits of the municipality as they now may, or may hereafter exist.

SECTION 3. The poles, towers, conduits, cable conductors, transformers, fittings, appliances and appurtenances, whether now in use or hereafter devised, shall be constructed so as not to unreasonably interfere with the proper use of the streets, avenues, alleys, ways, bridges, public places and grounds in said municipality, the municipality to approve location of same, and same shall be moved at expense of Grantee when necessary for paving, and shall be maintained in a reasonably safe condition and repair.

SECTION 4. Grantee may, from time to time, declare, make and enforce reasonable rules and regulations as a condition for the sale or distribution of electric current by it to the municipality, or any consumer therein or thereabouts during the life of franchise.

SECTION 5. In the event the supply of electric energy should be interrupted or fail by reason of accident, or otherwise, beyond the control of Grantee, the Grantee

shall restore the service within a reasonable time, and such interruptions shall not constitute a breach of this franchise, nor shall the Grantee be liable for damage by reason of such interruptions or failure.

SECTION 6. Grantee will pay to the municipality a sum of money equal to two per cent (2%) of the receipts of the Grantee from the sale of electric service at retail for residential and commercial purposes (sales tax excluded) within the corporate limits of the municipality as shown by Grantee's billing records, such payments to be due quarterly and the annual aggregate amount of such payments shall not be less than $100. Provided, however, the obligation to make said payment is conditional in that the full amount specified shall be paid during the term of this franchise unless and except should there be collected by the municipality from the Grantee any new taxes of any nature whatsoever imposed subsequent to the date of this franchise, or should there be an increase in the rates of any taxes now being collected by the municipality (except advalorem taxes now authorized by law), then the payment herein provided to be made by the Grantee to the municipality will be decreased by such amount.

SECTION 7. The Mayor and Clerk are authorized to execute, upon the part of the municipality, all requisite contracts with Grantee which have been approved by the Mayor and Board of Aldermen.

SECTION 8. The Clerk shall publish this ordinance according to the requirements of law, as soon as practicable after the passage hereof, and Grantee shall pay to said Clerk any and all costs and expenses of such publication.

SECTION 9. If any clause or section of this ordinance is illegal, or is not embraced within the title hereof,

or is not cognate to the subject expressed in the title, the remaining provisions hereof shall not be thereby affected, but shall have full force and effect.

SECTION 10. This ordinance shall take effect from and after its passage; but Grantee shall not be bound hereby if within 30 days from and after this date it declines in writing to accept this grant. The foregoing ordinance was reduced to writing and proposed and introduced by Alderman W. S. Gerard, and was read, considered and voted upon by sections and as a whole; the vote on each and all of the sections, and upon the ordinance as an entirety, was taken by "yea" and "nay" vote, those voting "yea" being as follows: Aldermen J. E. Allen, Kennedy Bryan, W. S. Gerard, E. A. Hammond, and James L. Shelton, and those voting "nay" being: Aldermen: None, ..., and was adopted on this the 23rd day of February, 1948.

/s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. A. Hammond
Clerk

SEAL

Street Lighting Agreement

Between

Municipality of Winona, Mississippi

and

MISSISSIPPI POWER & LIGHT COMPANY

THIS AGREEMENT made and entered into this the 23rd day of February, 1948, by and between the Municipality of Winona, Mississippi, a municipal corporation, here-

inafter called "Municipality", and MISSISSIPPI POWER & LIGHT COMPANY, hereinafter called "Company"

WITNESSETH:

In consideration of the mutual covenants contained herein it is agreed as follows:

1. Company will furnish and Municipality will take and pay for its entire street lighting service during the term of this Agreement in accordance with Rate Schedule SL-4 &, attached hereto and made a part hereof.

SL-5

2. The service to be furnished as of the date of this Agreement consists of the following equipment:

A. Owned and Maintained by Company

(1) Overhead Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	49
2,500	52
4,000	
6,000	
10,000	

(b) Luminaires:

Radial wave reflectors or equivalent	101
Open suburban reflectors	
Small Pendant globe	
Center suspension units	5
Mast arms over 8 ft., no. of ft. over 8	

(c) Wood Poles

(d) Overhead Supply Lines, Circuit Ft. 43,400

(2) Whiteway Street Lighting System—

(a) Lamps:

Lumens	Number
1,000	
2,500	
4,000	
6,000	
10,000	

(b) Luminaires

(c) Standards

(d) Supply Lines:

Overhead, circuit ft.
Underground, circuit ft.

B. Owned and maintained by Municipality except that Company shall furnish and replace lamps—

No. of Fixtures	Size of Lamp	No. Lamps per Fixture
19	2500 Lumens	One

3. Additional street lighting service other than as provided herein requiring the installation of additional facilities shall be by a supplementary agreement in writing and approved by an authorized official of the Municipality and an authorized official of the Company.

4. Payments are to be made by Municipality on or before the 10th day of each month for service rendered during the preceding month, and in case of failure to pay on or before that time, service may be discontinued by Company without terminating this contract, or waiving or impairing any of the right accruing to Company hereunder.

5. The Company shall use reasonable diligence to furnish continuous service hereunder but shall not be liable to the Municipality, or its inhabitants for failure to deliver service hereunder for causes reasonably beyond its control.

6. The term of this Agreement shall be for five years from and after the date hereof and shall be automatically extended for a period of five years from each expiration date of such time, or any automatic extension thereof, unless and until either party shall notify the other in writing not less than 180 days nor more than 360 days prior to any expiration date of its intention to terminate this Agreement.

7. This Agreement is subject to approval of Company's Vice-President.

Executed in triplicate original on the day and year first above mentioned.

MISSISSIPPI POWER & LIGHT COMPANY
By /s/ W. W. Williams

APPROVED:

/s/ R. B. Wilson
Vice-President

MUNICIPALITY OF Winona, MISSISSIPPI
By /s/ J. M. Lamb
Mayor

ATTEST:

/s/ E. W. Hammond
Clerk

SEAL

APPENDIX "D"

Section 3375, *Mississippi Code of 1942*:

> "The corporate name of a city shall be 'The city of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which the place is commonly known); and by such name may sue and be sued and suits against any municipality shall be instituted in the county in which such municipality is situated where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

Section 3374-02, *Recompiled Mississippi Code of 1942*:

> "The corporate name of a city shall be 'The City of . . .'; of a town, 'The town of . . .'; and of a village, 'The village of . . .'; (filling the blank in each case with the name by which such municipality has been legally designated); and by such name may sue and be sued, and suits against any municipality shall be instituted in the county in which such municipality is situated, where such actions are brought in the circuit or chancery or county courts, and where such municipality is wholly situated in one county; and in a case where a county has two judicial districts, such suits shall be brought in the judicial district in which

the municipality or its principal office is located; and in cases where a municipality is located in two counties, such suits shall be brought in the county in which the principal office of the municipality is located; and as to justice of the peace actions, the same shall be brought in the justice district in which the municipality or its principal office is located. And such municipalities may contract and be contracted with and exercise and perform all municipal powers and duties."

Section 3376, *Mississippi Code of 1942*:

"The limits and boundaries of the existing cities, towns and villages, shall remain as now established until altered, as herein provided: To enlarge or contract the boundaries of a city or town or village by adding thereto adjacent unincorporated territory, or excluding therefrom any part of the incorporated territory of such municipality, it shall be necessary for the municipal authorities to pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits and also defining the entire boundary as changed. Any two or more cities or towns situated and being adjacent or sufficiently near each other may combine into and become one municipality, in which event it shall be necessary for the municipal boards of mayor and aldermen of each of said municipalities so proposed to unite into one municipality to pass an ordinance at a regular meeting of said boards declaring the intention of the said city or town to unite with such municipality, or municipalities, as it is proposed to combine into one municipality, defining with certainty the name of the municipality that shall be formed and the territory which it includes when so formed, and the entire boundary thereof, provided that the provisions of this section shall not apply to towns or villages with a population of less than three hundred, unless the territory which it is proposed to add to and include in the corporate limits of such towns or villages

shall have been surveyed and platted into lots and blocks, and a map thereof duly recorded, and unless four-fifths of the property owners of said territory shall petition the municipal authorities of such towns or villages to add such territory to and include the same in the corporate limits of such towns or villages; and no cities or towns shall combine into one municipality where their present corporate limits are more than three miles apart."

Section 3374-10, *Recompiled Mississippi Code of 1942*:

"The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory which it is proposed to include in or exclude from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall in general terms describe the proposed improvements to be made in the annexed territory and the manner and extent of such improvements and the approximate time within which such improvements are to be made, and such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement of the reasons for such contraction and a statement showing whereby the public convenience and necessity would be served thereby."

Section 7716-01, et seq., *Recompiled Mississippi Code of 1942*, the Public Utility Act of 1956, especially Sections 7716-05, 7716-05(b) and 7716-38:

"No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D(3) of section 1 (§7716-01), of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

"(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

"(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or

maps on file with the Mississippi Public Service Commission on the effective date of this act.

"(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

"(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or additions to their facilities within their respective certificated areas of said municipality, including any extensions of the corporate limits thereof.

"When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regula-

tion therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

"(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1D(1) and 1D(2) (§7716-01) and in the case of a utility defined in 1D(3) (§7716-01) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation

or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

"(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

"(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates, or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 (this section) hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with

or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

"In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned, the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

"In the case of a public utility as defined in section 1D(3) (§7716-01) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the effective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided."

Section 7716-38:

"Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights ac-

cruing, accrued or established prior to the effective date of this act."

Section 88, *Mississippi Constitution of 1890*:

"The legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all such laws shall be subject to repeal or amendment."

Section 2780, *Recompiled Mississippi Code of 1942*:

"All companies, associations of persons, municipalities, associations of municipalities, or natural gas districts, incorporated or organized for the purpose of building or constructing pipe lines and appliances for the conveying and distribution of oil or gas or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipe lines and appliances along or across highways, waters, railroads, canals, and public lands, above or below grounds, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands. The board of supervisors of any county through which any such line may pass, shall have the power to regulate, within their respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county and all such companies, associations of persons, municipalities, associations of municipalities or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof."

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 403

MISSISSIPPI POWER & LIGHT COMPANY, MISSISSIPPI MUNICIPAL ASSOCIATION, AND CITY OF CLINTON,
Petitioners,
v.
CAPITAL ELECTRIC POWER ASSOCIATION,
Respondent.

MISSISSIPPI POWER & LIGHT COMPANY AND MISSISSIPPI MUNICIPAL ASSOCIATION,
Petitioners,
v.
DELTA ELECTRIC POWER ASSOCIATION,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

PRELIMINARY STATEMENT

After due submission, this Court upon November 12, 1963, decided this cause as shown by Appendix "A" hereto, and conformity with the State Court's decision was in progress. However, upon November 30, 1963, the writer, Garner W. Green, whose vision is seriously impaired, heard for the first time on the

record from The Printing House For the Blind, the article in *Reader's Digest,* December 1963, entitled "The REA—A Case Study of Bureaucracy Run Wild." The President of the Company, R. B. Wilson, and General Counsel, Sherwood W. Wise, were in route to New York, but the writer at once wired them that the facts recited in this article constituted such cogent evidence that a petition to rehear should be filed. This was authorized December 3, 1963.

PARTIES

The parties Petitioner in Cause No. 42,480 are Mississippi Power & Light Company (Petitioner), Mississippi Municipal Association (Intervenor) and City of Clinton (Intervenor). The parties Petitioner in Cause No. 42,535 are Mississippi Power & Light Company (Petitioner) and Mississippi Municipal Association (Intervenor). In both causes, said Petitioner and said Intervenors are collectively sometimes referred to as "Petitioner".

STATEMENT OF FACTS

This cause involves the gravest constitutional and statutory questions. It vitally affects the rights of every municipality to contract in advance for its utility needs so as to provide for future urban growth. At issue also is the right of a private utility furnishing central station power in a city to contract and build for such future needs—central station capacity must be built in advance.

The legislative history clearly demonstrates that the limited purpose of Congress in establishing the REA program was, through the subsidy of low-interest loans and tax exemption, to bring electricity to rural areas

where central station service was not available; solemn assurances were then repeatedly given that these governmental subsidies would not be mis-used or perverted outside of this limited purpose to destroy central station suppliers.

That here at issue is whether Petitioner may be vouchsafed the protection intended by Congress as against those cooperatives thus violating their limited purpose.

Petitioner having filed its Jurisdictional Statement herein—the case involving both an appeal as of right as to contract impairment, and a petition for writ of certiorari as to Federal questions—the Respondents made several responses thereto and Petitioner further replied. This Court upon Tuesday, November 12, 1963, entered an order, Appendix "A", whereunder the appeal was dismissed and certiorari was denied.

Even assuming the decision as to dismissing the appeal to be correct, Petitioner, with deference, insists that the refusal of certiorari is basically so contrary to Petitioner's rights in the several municipalities under the Federal statutes as that therefor certiorari should be granted limited to Question V in the Jurisdictional Statement, namely:

> "V. By reason of Title 7, U.S.C., Ch. 31, Section 901, et seq., Ch. 432, Title I, Section 4, 49 Stat. 1365, as amended, and said loan to Associations, has Appellant justiciable rights against Association?"

Since that contained in the article in *Reader's Digest*, made Appendix "B" hereto, supplies the requisite background, Petitioner's rights as against the Associations must be defined.

OPINIONS BELOW

The opinions below are: *Delta Electric Power Association* v. *Mississippi Power & Light Company,* Miss. , 149 So. 2nd 504, Suggestion of Error overruled without opinion, Appendix 1-A to Jurisdictional Statement; and *Capital Electric Power Association* v. *Mississippi Power & Light Company,* Miss. , 150 So. 2nd 534, Suggestion of Error overruled without opinion, Appendix 1-B to Jurisdictional Statement.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3). Petitioner specifically as against Respondents claimed rights under and by virtue of Title 7, U.S.C., Section 901, et seq., Ch. 432, Title I, Sec. 4, 49 Stat. 1365, which were denied. Sections 902 and 913 provide:

> "The Administrator is authorized and empowered to make loans in the several States and Territories of the United States for rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service and for the purpose of furnishing and improving telephone service in rural areas, as hereinafter provided; to make, or cause to be made, studies, investigations, and reports concerning the condition and progress of the electrification of and the furnishing of adequate telephone service in rural areas in the several States and Territories; and to publish and disseminate information with respect thereto."
>
> * * *
>
> "As used in this chapter the term 'rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in

excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof; the term 'farm' shall be deemed to mean a farm as defined in the publications of the Bureau of the Census; the term 'person' shall be deemed to mean any natural person, firm, corporation, or association; the term 'Territory' shall be deemed to include any insular possession of the United States."

ARGUMENT

Conceding the correctness of the decision by the Supreme Court of Mississippi of the local questions, yet Petitioner invoked as against the attack made on it the provisions of Title 7 U.S.C., Sections 901, et seq. As a matter of law, no efficacy was vouchsafed Petitioner's rights thereunder and they were totally rejected by the State Court; but thereasto it now appears that Petitioner can successfully make proof of those matters thus set forth in the *Reader's Digest* article, if given the opportunity to introduce the facts. In the light of that contained in said article, we substantially reiterate our reasons for certiorari thus:

Those affected by this legislation are entitled, with deference, to assume as 100% accurate those things said by the bill expressly and by those who fathered its enactment, especially Senator Norris. These are ample aid for judicial construction: Under authority granted by the Emergency Relief Appropriation Act, a temporary Rural Electrification Administration had been created by Executive Order, prior to 1936, as a means of relieving unemployment and the Act had its origin in Senate Bill No. 3483 (75th Cong., 2nd Sess.), which was designed to establish the Rural Electrifica-

tion Administration on a permanent basis and for a different purpose.

The Bill was reported out by the Senate Committee on Agriculture and Forestry without hearings. However, Senator Norris, who was in charge of the Bill on the floor of the Senate, stated, in response to inquiries from other Senators, that the Bill was not intended to authorize loans *"for the purpose of electrifying a rural area which is now supplied"*; that "where a plant is now in existence which is adequately supplying a certain area with electricity none of the money provided by the Bill could be used for that purpose"; and "There is no intention of going into a farming community which is already supplied electric current."

The report of the Senate Committee on Agriculture and Forestry states that the Committee had referred the Bill to the Secretary of Agriculture, to the temporary REA, to the Federal Power Commission, and to the Department of the Interior, and that each of these agencies had approved the Bill. (Sen. Rep. No. 1581, 74th Cong., 2nd Sess.). A number of amendments recommended by the Senate Committee had been inserted at the suggestion or request of the temporary REA (80 Cong. Rec. 2752, 2755, 2758).

The House Committee on Interstate and Foreign Commerce (Congressman Rayburn, Chairman) held extensive hearings upon the Bill as passed by the Senate. At the request of Chairman Rayburn, Mr. Cooke appeared before the House Committee, explained the Bill, and stated that he was appearing in its support. Report of Hearings, pp. 2, 4. In response to questions from members on the House Com-

mittee, Mr. Cooke testified that it was contemplated by the Bill that distribution lines would *"receive current from established utilities"*; that the bill was intended to carry on the practices of the temporary REA; that the practice of the temporary REA was to use *"the current of private companies or other existing plants"* and to build no *"competing transmission lines"*; that it was not the purpose of the Bill "to furnish electricity or to lend money for anyone to get electricity *where it is available*"; and that the "central station service" provision was intended to authorize loans to construct facilities to serve residents of rural areas who were receiving service from *"individual Delco plants"* but did not have *"the normal service from a power line"*.

In the course of the House debate, Congressman Rayburn, who was in charge of the Bill, stated:

> "May I say to the gentlemen that we are not, in this bill, intending *to go out and compete with anybody.* By this bill we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them." (80 Cong. Rec. 5283, 1936).

In the course of the House Debate, Congressman Fletcher, speaking in support of the Bill, said:

> *"There is no desire to provide loans either where service exists or where, legitimately and in truth, the power companies are about to provide service."* (80 Cong. Rec. 5308).

In an Opinion dated November 24, 1942, the Solicitor of the Department of Agriculture, in construing

REA's authority to make loans "for the furnishing of electrical service to persons in rural areas who are not receiving central station service", said:

> "A study of the debates in Congress and the Committee hearings indicates that this provision was inserted because of a legislative intent to exclude loans for the purpose of paralleling existing systems and thus creating competition with established utilities." (Opinion No. 4506, Hearings, Senate Subcommittee on Agriculture Appropriations for 1951, 81st Cong., 2nd Sess., p. 1378).

With respect to the meaning of "central station service" as used in Section 4 of the Act, W. Carroll Hunter, Solicitor of the Department of Agriculture, in Opinion No. 5247, dated November 3, 1948, said:

> "Congressional debates and committee hearings contain frequent references to the clause in question; but, as has been noted, these discussions were generally concerned with the question of competition. The term 'central station service', in itself, was generally envisioned as relating to the difference between the small Delco plant serving the individual farm (which was, clearly, not receiving 'central station service'), and the utility company's high line, carrying 2,200, 6,600 or some other common distribution voltage, which passes down the road to serve others. *This distinction serves to emphasize the point that the interest of Congress, in this provision, was to prevent competition with established utilities.* * * *."

It is judicially known that these loans to the Respondents are on a basis of 2% interest and that the current cost of money to the United States is nearly 4%. Too, these Respondents are assumed to be tax

exempt insofar as the Federal income tax is concerned and the cost to the Federal Government of this immunity is stated to be $150,000,000 by Robert T. Patterson, former professor of economics at Claremont Men's College in his book, "The Tax Exemption of Cooperatives". Besides, the Petitioner is compelled to pay not only Federal but State income taxes aggregating approximately 60% for the general welfare.

In addition, at this date more than 98% of the farms in the nation have been electrified and are receiving all electricity they fain would have. Officials of the REA recognized that Congress expected rural electric cooperatives to be almost exclusively distributors of electricity. In 1936, the first Administrator of the REA program told a committee of the House of Representatives that "in 99 instances out of 100 they are going to buy current from existing plants". Out of the new customers, five out of six, the Court may judicially know, are not in rural territory, but are adjacent to the fast developing urban population and within the area for which central station power has been planned and installed. Such urban customers should be classified as such and should not, as against those who dwell within the municipality, be vouchsafed a fundamental exemption from municipal regulation and taxation.

In addition, it may be judicially noted that the REA is actively promoting generation and transmission lines at government expense; and it is claimed that the average cost from the investor-owned power companies is less considerably than that being obtained from such REA operations. Furthermore, thereasto a profound secrecy, certainly impenetrable to Petitioner, is sought to be maintained.

The deference due Congressional discussion is exemplified in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 10 L. ed. 2nd 915, 935; and *Commissioner of Internal Revenue* v. *Church*, 335 U.S. 632, 687, 93 L. ed. 288, 321. Herein, the terms of the statute are express. With deference, construction is not called for. *Rosenberg* v. *Fleuti*, 374 U.S. 449, 10 L. ed. 2nd 1000, 1003, 1009. Those who induced Congress thus to legislate made the representations upon which, with confidence, Petitioner relies. Herein Petitioner is not the actor but is a property owner claiming Federal statutory rights. The Petitioner has had that property destroyed, those rights forfeited, when Respondents were burdened with those restraints and restrictions thus expressly and explicitly declared by Congress. That at issue is whether Petitioner, thus attacked—not attacking—may invoke in defense the provisions expressly put in the statute and expressly explained by those who spoke with authority. *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. ed. 215.

Herein, there is not, with deference, a primary question of the standing to sue. *Abington School District* v. *Schempp*, 374 U.S. 203, 10 L. ed. 2nd 844; *Chicago* v. *Atchison, Topeka & Santa F. R. Co.*, 357 U.S. 77, 2 L. ed. 2nd 1174, cited in *Hanson* v. *Denckla*, 357 U.S. 235, 2 L. ed. 2nd 1283. Both the Commission and the State Court have denied Petitioner the right to interpose the provisions of this REA Act as a defense; but have expressly rewritten the Federal statute so as to authorize Respondents to preempt an area as a public utility, to oust Petitioner from service therein as to persons with whom it has a constitutional right to contract, and compelled a discontinuance of valid con-

tracts to Clinton and Winona, each being municipalities containing more than 4,000 people. This question is two-fold: (a) Has Petitioner those statutory rights openly declared and publicly proclaimed? And if not, (b) May Mississippi, by its Public Utility Act and its construction thereof, so subvert the Supremacy Clause as that Mississippi's statute and not the Federal statute is the law of the land? Compare *Capital Electric Power Association* v. *McGuffee*, 226 Miss. 227, 83 So. 2nd 837; *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 224 Miss. 40, 140 So. 2nd 286; *Capital Electric Power Association* v. *Hinson*, 230 Miss. 311, 92 So. 2nd 867; *Delta Electric Power Association* v. *Mississippi Power & Light Company*, Miss. , 149 So. 2nd 504; *Capital Electric Power Association* v. *Mississippi Power & Light Company*, Miss. , 150 So. 2nd 534.

The interplay between Federal and State power in a question of this character can only be solved here. Petitioner having relied upon the fair expressions in the statute and the promises of those who produced the REA Act, we do protest that this Court will not permit the promise to be kept to the ear but broken to the heart.

Under the evidence which can be produced in accordance with the *Reader's Digest* article and the law as written, this Court must lay down the line of demarcation and protect Petitioner in virtue of the express provisions in the statute contained, whereas against the

laws of Mississippi, with deference, are impotent under the Supremacy Clause.

Certiorari is respectfully prayed.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....

Attorney for Petitioners

APPENDIX "A"

SUPREME COURT OF THE UNITED STATES

MISSISSIPPI POWER & LIGHT CO. ET AL. v.
CAPITAL ELECTRIC POWER ASSOCIATION ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

No. 403. Decided November 12, 1963

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

APPENDIX "B"

Article from December, 1963 issue of Reader's Digest

BY KENNETH O. GILMORE & EUGENE H. METHVIN

Created in 1935 to bring electricity to farm areas, the Rural Electrification Administration has grown into a many-headed monster that is eating into the entire electric-power industry—and into the taxpayer's pocketbook as well

The REA—
A CASE STUDY OF BUREAUCRACY RUN WILD

The routine government press release began with a familiar ring: "Three thousand rural consumers will receive electricity for the first time as a result of loans approved by the Rural Electrification Administration." But down in the fine print the picture changed. Instead of helping rural people solely, over half the $4,063,000 handout went to one electric cooperative in the REA network, enabling it to supply power to a huge radar-equipped tracking center at Florida's Eglin Air Force Base. Worse, the

federal subsidy allowed the tax-free co-op to grab business from a long-established taxpaying private utility.

Stop and study this astounding case. Last winter the Air Force urgently needed extra electricity for its new space-research installation. A private investor-owned utility, the Gulf Power Co., offered to furnish the electricity from its nearby power system. Having served the base for 22 years, it was easily able to run in additional high-voltage lines. Moreover, its vast transmission grid guaranteed instant emergency service in the event of any power failure.

But an REA co-op—with no standby emergency system, no high-voltage lines into the base, and with its only adequate source of power 60 miles away in Alabama—submitted a slightly lower bid. And, astonishingly, last February the co-op was awarded the contract. Two months later REA announced it was turning $2,225,000 over to the co-op so it could build the high power line and install the necessary facilities, including a 10,000-kilowatt standby generating plant.

Such senseless spending and ruthless squashing of private enterprise are not all that is involved. This single deal will impose a $2,645,702 penalty on all taxpayers. First, the Florida co-op pays only a trifling two-percent interest on its $2,225,000 loan. This rate for REA loans was fixed by Congress in 1944. Today it is at least two percent below the normal commercial rate and about *half what it costs the U.S. government to borrow long-term money.* Thus, over the 35-year life of the loan, this two-percent subsidy will cost the Treasury $1,123,202. Second, by diverting the contract from the privately owned Gulf Power Co., the REA has deprived the government of $43,500 a year in corporation taxes.

Such cases are cropping up across the nation. In Indiana tax-fed co-ops are pirating away millions of dollars'

worth of business from private enterprise. And they're doing it in Colorado, Alabama, Kentucky, Arkansas, Louisiana, Illinois—almost everywhere the electric cooperatives are doing business.

No federally aided program better illustrates how big government, with its foot once in the door, arrogantly pushes its way into areas never contemplated by its original sponsors. Nearly three decades ago the REA was set up to bring electricity to remote rural areas. Today close to 98 percent of the farms in America have electric service, about half from REA co-ops and half from private power companies, a brilliant achievement for all concerned. Yet, with the job now virtually completed, REA continues to expand.

Its 1005 co-ops serve over 17 million persons. The number of co-op clients is increasing by 100,000 each year, and five of every six of these are non-farm. Co-ops can boast well over 300,000 industrial and commercial customers with close to 50,000 signed up in the last five years. Their power lines are plugging into factories, airports, drive-ins, lumber mills, cotton gins, sawmills, locker plants, oil pumping stations, suburban housing developments, even nightclubs. Co-ops today sell more than 60 percent of their power to non-farm buyers; and more than one fourth of the tax-free revenue collected by the REA's tax-supported co-ops comes from commercial enterprises. An REA survey ordered by Congress showed that 187 of these supposedly rural co-ops were doing business in towns with populations of over 1500.

Despite these prosperous operations, the administration demanded a whopping 425 million dollars for REA loans in fiscal 1964. This record-breaking sum is three times the amount requested three years ago.

Encouraged by the REA's affluence, co-ops are scrambling for all the two-percent cash they can get. Since 1960,

two thirds of all co-ops have come back to the REA for more money. This easy-money philosophy not only needlessly drains government funds; it is allowing REA co-ops to extend themselves far beyond their original bounds in these ways:

First, REA co-ops with their two-percent subsidy and tax-free advantages are competing unfairly with private business. When the late Sam Rayburn introduced the REA Act in Congress, he said, "The bill was not written to punish somebody or parallel their lines or enter into competition with them."

This, however, is precisely what has been happening. Not long ago a textile plant going up at Hemingway, S. C., was within 500 feet of a private power line. Yet a tax-fed co-op bid below the local power company's filed fee and strung in an estimated $14,000 worth of line to get the contract. Lost tax revenue from the private utility: $3100.

The Otter Tail Power Co., with a nearby power line, was preparing to supply electricity requested by an Air Force radar installation just west of Finley, N.D. A tax-aided local co-op grabbed the contract by installing 6½ miles of line.

"True competitive bidding cannot possibly be present in these situations," says Albert V. Hartl, president of Otter Tail Power. "Investor-owned utilities in most states have a standard rate set by the state utility commission that cannot be altered. The co-op can make its own rates to fit any special situation."

Second, REA has barged into the industrial-loan business, an activity ridiculously far removed from its original design. Under the law REA has always financed appliances, farm-chore machinery and home wiring in rural areas. But in July of 1961, without even consulting Congress, REA issued new administrative regulations authorizing loans for purchase and installation of electrical ma-

chinery and equipment for agricultural, commercial and industrial enterprises.

The first such loan was for $25,000 so that a co-op customer in North Dakota could buy gravel-crushing and -washing machinery. Before long $22,000 was handed out to a ski resort in Illinois to buy and install snow-making equipment, motors for rope tows and a chair lift, and outdoor lights. It was a nifty deal; the co-op charged four percent for its two-percent money and the resort simultaneously purchased about a million kilowatts of power a year from the co-op. "It would take a lot of farmers to account for that much," said Charles Youtzy, the co-op manager.

A stunned House Agricultural Committee warned in 1962 that REA's interpretation of the law in making these loans was "inconsistent with the original intent of Congress." Yet REA boasted last winter that it had approved 14 of these special loans totaling $1,232,068—enabling co-ops to become involved in enterprises ranging from seed-potato processing to lace manufacture.

Third, REA-subsidized co-ops use their tax-free earnings for a variety of private, profit-making ventures. More than half of the $589,151,000 belonging to co-ops is drawing interest in government bonds. Another $146,525,000 is invested even more profitably in such institutions as savings-and-loan associations, savings banks and "associated enterprises." An Arkansas co-op remodeled its headquarters building with Washington's two-percent money while investing $35,000 of its own funds in a shirt factory. Butler Rural Electric Cooperative, Inc., of Hamilton, Ohio, had enough tax-free earnings on hand to buy up roughly $55,000 worth of shares in the Cincinnati Gas & Electric Co., a private utility. Since 1936 this cooperative has borrowed $1,912,805 from the REA.

Fourth, many co-ops have been allowed to draw more funds from REA's kitty despite remarkable records of

prosperity. REA recently admitted that by June 1962 217 borrowers had piled up cash and liquid reserves equaling more than 20 percent of the entire value of their plants. A co-op serving between the growing towns of Marshall, Texas, and Shreveport, La., accumulated $1,155,000 in investments and current assets, making it one of the nation's richest. Instead of dipping into this plentiful reserve to build new lines, it borrowed $360,000 from the REA at two percent.

On the fringes of sprawling Columbus, Ohio, are five towns served by REA lines since 1944. By 1959 their populations had quadrupled to 15,500 and the co-op averaged a healthy 19 customers per mile of line. Yet that summer it borrowed $2,500,000 more from REA to hook up 4700 new customers.

In the booming suburbs of Washington, D.C., the Southern Maryland Electric Cooperative, Inc., draws 34 percent of its revenue from commercial and industrial customers and serves Lexington Park, Md., a town of 7000. Nevertheless, in April 1958 it needlessly sought almost three million dollars of REA's two-percent money to finance further expansion.

Fifth, and most alarming, REA is pouring out gigantic funds for the construction of co-op power plants. Set up primarily to *carry* power, REA is now moving into the power *producing* field. During the past two years REA has approved power-type loans to 35 cooperatives totaling 319 million dollars. Last January, more than 60 percent of the funds requested in the REA budget for new-loan authorizations were earmarked for generating plants and their transmission facilities, commonly called G&T loans.

Until the new REA chieftain Norman Clapp came into office in 1961, REA's own regulations had specifically stated that G&T loans should be made to co-ops only when the power was not available from private companies, or

when these companies charged too much for supplying the co-ops with wholesale electricity. In May 1961, the REA issued Bulletin 20-6 which justified loans for power plants "to protect the security and effectiveness of REA-financed systems." This vague language gave the REA leeway to hand out money for generating systems, whether or not they were actually needed.

Soon thereafter, 16 Indiana co-ops were handed 60 million dollars, the largest single loan in REA history, to build a 198,000-kilowatt generating station and 1552 miles of transmission lines. It was a pure giveaway, for private enterprise with adequate power facilities was able and willing to supply energy to these co-ops at reasonable rates.

No G&T loan better illustrates REA's hasty and secretive techniques than a 22-million-dollar deal involving Colorado-Ute Electric Association of Montrose, Colo. Negotiations for this mammoth handout quietly took place during 1961. When a reporter sought information, Hubert W. Kelley, Jr., of the REA responded: "Every detail of a loan application is private and confidential. If that's wraps, we are wrapping it."

Private-utility officials journeyed to Washington to explain to Congress why such a loan was wasteful and unwise but, before they could finish, REA announced that it was granting the loan. Its haste is made even more incredible by the fact that, at the time, REA engineers did not know where the proposed plant would be built nor what would be the source or the cost of its fuel or the means of transmitting its power.

Such REA loans only subsidize inefficiency, for it is a proven fact that big plants belonging to private utilities can produce electricity on a large scale at much lower cost than the smaller co-op systems. REA's own statistics show that electricity sold by REA-financed plants cost the

co-ops 30 percent more than electricity they bought from taxpaying private companies.

When investor-owned utilities propose to expand by offering securities to the public, state and federal laws require them to make full and complete disclosures. Yet REA has never held public hearings to collect all the facts surrounding these huge loans which are footed by the taxpayers. This double standard has imposed a severe handicap on private companies. In Alabama a co-op was recently granted a 20-million-dollar G&T loan. Unable to find out what facts had persuaded Washington, the affected private utility went to the Alabama courts, finally forcing REA and the co-op to show the documents they had refused to disclose.

"We found that the co-op's application to the REA was loaded with accusations against our company," Walter Bouldin, vice president of the Edison Electric Institute and president of the Alabama Power Co., told a Congressional committee last spring. "We were able in open hearings to refute these accusations. But the important point is that REA had accepted these charges and evidently based its finding upon them. Our company was accused, tried and convicted with no opportunity on our part to confront the witnesses against us."

How much further will this reckless drive to establish a vast and ever more costly power empire go before it is stopped? Clearly the vast majority of co-ops no longer need the subsidies they were originally granted to help them get started. They can raise their own capital for expansion as do private companies by selling bonds on the public market or to their own members. But with the welcome sign out in Washington, co-ops find it hard to forego the easy-loan temptation. One co-op manager recently confided: "I couldn't face my people back home if I didn't borrow all the money I could from the government."

Herein lies perhaps the greatest danger of this gravy train: it fosters the insidious idea that federal assistance once granted should last forever. The peak of this deadening dependence on Washington was reached when a co-op manager told a Senate committee that the U.S. government has a duty to supply his co-op "with all the power they need, today, next year and thereafter, at 100 percent of their requirements."

To understand what REA was intended to be and *could* be, consider a Georgia area into which REA went in 1936. It was one of the South's most wretched economic regions, comprising seven mountainous counties around the town of Dalton. The mountain people were helped to organize the North Georgia Electric Membership Corp., which tottered on the verge of bankruptcy for three years. But with a new manager, W. L. Manton, the former owner of a small private utility put out of business by the Tennessee Valley Authority, things soon began to improve.

The biggest boost came when Chattanooga's postwar suburban sprawl lapped over into the co-op's once rural area, and hundreds of new customers drew their electricity from its lines. Despite the huge job of meeting this heavy demand, the co-op has not since 1949 gone back to Washington for another penny. Instead, it has dug into its own profits for the half million dollars needed yearly to beef up its lines. To top it all, five years ago the co-op's 22,000 members voted overwhelmingly to pay off their debt to Washington.

"We appreciated the government's help to get us started," says Manton, "but we were not going to impose on the taxpayers."

In June 1962 he proudly presented REA with a check paying off in full the $1,631,000 the co-op had borrowed from the government. During REA's entire history *only nine co-ops have thus fulfilled REA's motto, "Owned by*

those we serve," by paying off their government loans out of their earnings!

This is an incredibly poor record, yet it shows what can be done. In Lebanon, Ind., one of these co-ops is now wholly member-owned. Within commuting distance of Indianapolis, its area is so booming that in the next decade it must make tremendous cash outlays to supply twice as many consumers and four times as much power. But are these Hoosiers running back to Washington for more taxpayer-subsidized loans? Not at all. They hired a Purdue University economist and are trying to devise a plan to finance their expansion by selling their own bonds to their own members.

Such independence must be encouraged. Only a courageous Congress can do this, by ending the two-percent subsidy except in those few isolated areas where co-ops obviously cannot survive without federal help. President Eisenhower urged co-op leaders to set up an independent bank similar to the one already operating successfully under the Farm Credit Administration. Such an institution can raise on the open market whatever expansion capital is needed beyond what co-ops can muster from their own profits and their shareholding members.

This is but one of several realistic methods whereby co-ops **can** stand on their own feet. The simple fact is that they no longer need to be propped up by the taxpayers. Even today's zealous advocate of increased federal subsidies, REA boss Norman Clapp, had to admit after intensive Congressional questioning that "someday" co-ops "will be in a position to provide all these services for themselves."

Why not *now*, Mr. Clapp?

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